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Chapter 1: Introduction

1 Introductory

The general theme of this mini-dissertation is the capacity of a beneficiary to inherit and the general common law principle regarding unworthiness. This principle entails that no one should be allowed to benefit from his own wrongful act or derive a benefit from conduct which is punishable.¹ The principle is a wide concept that acts as an umbrella term for all behaviour that can be classified as wrongful. The Roman-Dutch authors list numerous grounds on which a beneficiary could be considered unworthy to inherit.² There is a current trend in South African courts, however, to extend the abovementioned principle of unworthiness and to declare persons unworthy on basis of “public policy” instead of using the existing general common law principle.³ Although the law should keep up with society’s changing needs,⁴ it seems unnecessary to invent a completely new basis for unworthiness to inherit. It will be argued that all wrongful conduct can be brought home under the existing common law principle of unworthiness, and that there isn’t a need for a drastic departure from the general principle.

2 Problem statement

The main purpose of this study is to discuss existing common law grounds of unworthiness⁵ and to critically analyse the recent trend by courts to extend these grounds merely on the basis of “public policy”.⁶ This will be discussed with reference to the general rule in the law of succession that all persons have capacity to inherit,⁷ as well as an investigation of the exceptions to this rule.⁸ The case of *Taylor v Pim*⁹ is an important starting point for this study.¹⁰ It is the defining case in our law

¹ Voet *Commentarius ad Pandectas* 34 9 6 (Gane’s translation 1956).

² See ch 2 fn 32 below.

³ *Pillay v Nagan* 2001 (1) SA 410 (D) 424.

⁴ Sonnekus “Onwaardigheid vir erfopvolging én versekeringsbegunstiging” 2010 *TSAR* 176 178.

⁵ See ch 2 below.

⁶ See ch 3 below. This also to a certain extent applies when the grounds for unworthiness are extended to fields outside the law of succession. See ch 4 below.

⁷ Although this will include juristic persons, this study will be limited to the capacity to inherit of natural persons.

⁸ See ch 2 below.

⁹ (1903) 24 NLR 484.

¹⁰ See ch 3 below.

regarding extension of the categories of unworthiness to other actions¹¹ by a beneficiary. Although the court interprets the unworthiness principle correctly,¹² it is argued that the judicial precedent set in *Taylor v Pim*¹³ is misinterpreted by courts in subsequent cases.¹⁴

3 Underlying legal questions

The following questions will be addressed:

- 1 When is a person unworthy to inherit?¹⁵
- 2 The *bloedige hand* maxim
 - 2 1 Should the *bloedige hand* maxim be categorised under general unworthiness or does it fall under specific unworthiness?¹⁶
 - 2 2 Who is included under the *coniunctissimi* of a deceased?¹⁷
 - 2 3 Does the *bloedige hand* maxim include negligent killing?¹⁸
 - 2 4 Is the *bloedige hand* maxim applicable when the killer lacked capacity to act?¹⁹
- 3 What are the consequences of unworthiness?²⁰
- 4 Is there a need to extend common law grounds of unworthiness *within* the law of succession?
 - 4 1 Is the existing common law rule of unworthiness broad enough to include *all* possible grounds of unworthiness?²¹
 - 4 2 Is there space within the South African law system to include an argument based on or similar to the Domat's Gloss as a separate, recognised ground for unworthiness?²²
 - 4 3 Should the existing common law grounds of unworthy people be developed gradually as public policy changes?²³

¹¹ Actions other than killing.

¹² Namely that no one can benefit himself or herself by his or her own wrongful act.

¹³ (1903) 24 NLR 484.

¹⁴ See ch 3 below.

¹⁵ See ch 2 par 3 below.

¹⁶ See ch 2 par 3 2 below.

¹⁷ See ch 2 par 3 2 2 below.

¹⁸ See ch 2 par 3 2 3 below.

¹⁹ See ch 2 par 3 2 4 below.

²⁰ See ch 2 par 4 below.

²¹ See ch 3.

²² See ch 3.

²³ See ch 3.

- 5 Should the grounds of unworthiness include actions other than killing?²⁴
- 6 How does one define “public policy”?²⁵
- 7 Is there a need to extend common law grounds of unworthiness to fields *outside* the law of succession?
 - 7 1 Should an unworthy beneficiary also forfeit matrimonial property benefits?²⁶
 - 7 2 Should an unworthy beneficiary also forfeit insurance benefits and policy proceeds?²⁷
 - 7 3 Should an unworthy beneficiary also forfeit pension fund benefits?²⁸
 - 7 4 Should an unworthy beneficiary also forfeit claims for maintenance and legal costs?²⁹
- 8 Can there be a workable balance between gradually extending existing common law grounds of unworthiness to keep up with society’s changing needs on the one hand, and a drastic departure from the existing grounds on the other hand?³⁰

4 Methodology

A multi-layered and critical approach is followed. Material and formal aspects of the law of testate and intestate succession, common law, academic opinion and to a lesser degree some aspects of criminal law are taken into account. Relevant legislation, constitutional values, judicial precedents, textbooks and journal articles are analysed. Where relevant and insightful, the South African position is compared to foreign law. The study is limited to instances where disqualification to inherit arises from unworthy conduct or behaviour that is punishable, resulting in a person benefiting through his own wrongful act.³¹

²⁴ See ch 3.

²⁵ See ch 3 par 8.

²⁶ See ch 4 par 2.

²⁷ See ch 4 par 3.

²⁸ See ch 4 par 4.

²⁹ See ch 4 par 5.

³⁰ See ch 5.

³¹ There are also instances where a beneficiary will be disqualified from inheriting for other reasons. S 2B of the Wills Act 7 of 1953 provides that, if a testator dies within three months of his marriage being dissolved by divorce or annulment, the will he executed prior to the dissolution of the marriage must be implemented as if his former spouse had died before the dissolution of the marriage, unless it is clear from the will that the testator did indeed intend to benefit the former spouse despite dissolution of the marriage. The former spouse will therefore not inherit, unless the testator dies more than three months before, and never changed

5 Structure

In chapter 2 the persons who do have capacity to inherit are mentioned briefly, while the persons who are unworthy to inherit are investigated in more detail, with emphasis on the difference between general and specific unworthiness. The consequences of disqualification are pointed out and addressed. In chapter 3 the need for extending the existing common law grounds of unworthiness in the law of succession is discussed. The court in *Taylor v Pim*³² correctly interprets the general common law principle of unworthiness, but it is argued that subsequent court cases misinterpret the existing judicial precedent. In chapter 4 the need for extending the existing common law grounds of unworthiness to fields outside the law of succession is investigated. The wider application of the general common law ground of unworthiness ensures that a wrongdoer can also not take benefits that fall outside of the deceased estate. In the concluding chapter, the most important points and findings are summarised. Suggestions for reform are advanced in this chapter, followed by concluding remarks.

his will. S 4A(1) of the Wills Act provides that any person who attests or signs a will as a witness, or who signs a will in the presence and by direction of the testator, or writes out the will or part of it in his own handwriting, will be disqualified from receiving any benefit from that will. The same rule goes for the spouse of such a person.

³² (1903) 24 NLR 484.

Chapter 2: Disqualification from inheriting

1 Introduction

In South Africa it is a general rule that all persons have the capacity of being either testate or intestate heirs, regardless of whether they are born or unborn, natural or juristic persons and regardless of their legal capacity.³³ To this general rule there are a number of statutory and common law exceptions. In this chapter people who have capacity to inherit will be mentioned, while the different categories of disqualification to inherit will be investigated in more detail.³⁴

2 Capacity to inherit

It is a basic rule of inheritance that a beneficiary must be competent to inherit.³⁵ The capacity to inherit is the ability to acquire a vested right³⁶ in the inheritance, whether or not the beneficiary is able to enjoy the inheritance.³⁷ There are clearly defined categories of beneficiaries who have capacity to inherit in the South African law of succession.³⁸ The general rule is that a person who is a major, who is of sound mind, is not insolvent and who does not repudiate an inheritance, will not only acquire a vested right to an unconditional inheritance, but will also be able to exercise unrestricted enjoyment of the inheritance.³⁹ Section 2D(1)(a) of the Wills Act⁴⁰ provides that adopted children will be seen as the children of their adoptive parents for purposes of succession. Section 1(2) of the Intestate Succession Act⁴¹ and section 2(D)(1)(b) of the Wills Act now afford children born out of wedlock the same status as children born in a valid marriage when it comes to testate and intestate succession. Section 2D(1)(c) of the Wills Act gives statutory recognition to

³³ Corbett Hofmeyr and Kahn *The Law of Succession in South Africa* (2001) 117.

³⁴ See par 3 below.

³⁵ Paleker in Jamneck and Rautenbach (eds) *The Law of Succession in South Africa* (2012) 99.

³⁶ The right to claim a benefit from the executor.

³⁷ This distinction between a vested right and the ability to enjoy an inheritance becomes relevant when considering the position of, for example, a minor beneficiary, a beneficiary who suffers from a mental disability, or a beneficiary whose legal standing is impaired on account of, for example, insolvency.

³⁸ Although juristic persons can also inherit in terms of testate succession, this study will be limited to natural persons.

³⁹ Paleker in Jamneck *et al* (eds) 100.

⁴⁰ 7 of 1953 (hereinafter referred to as the "Wills Act").

⁴¹ 81 of 1987 (hereinafter referred to as the "Intestate Succession Act").

the *nasciturus* fiction,⁴² providing for a benefit allocated to the children of a person to vest in a child already conceived at the time of the benefit and who is later born alive. A person of unsound mind has capacity to inherit; however, this capacity is limited, as he will need a court-appointed *curator bonis* to administer the benefit on his behalf.⁴³ An insolvent person retains the capacity to inherit, but any property which he receives will fall into the insolvent estate and must be administered by a trustee for the benefit of the creditors.⁴⁴

3 The unworthy person

Barns and Thompson⁴⁵ highlight the main circumstances that exist where a person may be disqualified from taking benefits from a deceased estate according to the South African common law. In the first place, and also the starting point of this study, the general principle that no-one may benefit from his own wrongful act. In the second place is the Roman-Dutch principle that states that any person who unlawfully kills⁴⁶ another will not be entitled to inherit from his victim.⁴⁷ This exclusion is based on two principles: The general principle that no-one may be enriched by his own wrongful conduct or benefits from any conduct that is punishable by law and the existing principle in the law of succession that the *bloedige hand* cannot inherit. Thirdly, the principle which states that a person whose conduct offends the notions of public policy may be deemed unworthy to take an inheritance or any other benefit from the deceased's estate.⁴⁸

⁴² An unborn child's interests are protected and their rights kept in abeyance until the moment that they are born alive. *Ex parte Administrators Estate Asmall* 1954 (1) PH G4 (N); *Ex parte Boedel Steenkamp* 1962 (3) SA 954 (O).

⁴³ S 43 of the Administration of Estates Act 66 of 1965. See par 4 for a discussion on the capacity to act of a mentally ill person.

⁴⁴ S 20 of the Insolvency Act 24 of 1936.

⁴⁵ "Reconsidering the indignus principle in the South African law of succession " in De Waal and Paleker *South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123.

⁴⁶ This includes murder as well as culpable homicide.

⁴⁷ Voet *Commentarius ad Pandectas* 34 9 6 (Gane's translation 1956); Van Leeuwen *Censura Forensis* 3 4 42 (Schreiner's translation 1883). This exclusion is based on two principles: The general principle that no-one may benefit from his own wrongful act (See Van Leeuwen *Het Roomsche Hollandsche Recht* 3 3 9 (Kotzé's translation 1881); *Taylor v Pim* (1903) 24 NLR 484; *Ex parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T) 752D-E read with 752G-H. *Parity Insurance Co Limited v Marescia* 1965 (3) SA 430 (A) 435A-B) and the existing principle in the law of succession that the *bloedige hand* cannot inherit (See Grotius *Inleiding* 2 28 42 (Maasdorp translation 1903).

⁴⁸ See discussion of Domat in ch 3 par [1] below.

This study only investigates disqualification due to wrongful conduct and is limited to those grounds of unworthiness that is still in force today.⁴⁹ It is noticeable that, although the Roman Dutch writers attempt to list specific grounds of unworthiness to inherit, they tend to render unworthy any person who did not *deserve*, for whatever reason, to inherit from the deceased.⁵⁰

South African customary law of succession has its own grounds of unworthiness to inherit, some of which are also not applicable anymore in modern customary law.⁵¹

⁴⁹ Although it is true that most of these grounds are absolute today, there are still some of the grounds that are still in force. As discussed in the case of *Taylor v Pim* (1903) 24 NLR 484, where the court relied on some of these grounds, namely that an adulterer cannot appoint an adulterous heir or legatee, and also that heirs who neglected the beneficiary through fault or negligence in such a way that he died in consequence will also be unworthy to inherit from such a deceased person. (See Voet 5 28 6 and Digest 34 9 3; discussion in *Taylor v Pim* (1903) NLR 484 491-492 and *Ex Parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T) 749F-H.

⁵⁰ There are several Roman Dutch grounds of unworthiness that are absolute today. A testator's slave was not allowed to inherit from him unless he was freed in the will. (See Voci *Diritto ereditario romano* (1967) 401). A person who was not a Roman citizen was seen as unworthy and a spouse of a particularly rich Roman citizen was also not allowed to inherit from the rich spouse. (See Voci 401). Lack of respect displayed by a beneficiary towards the deceased was also a ground of unworthiness. (See Nardi *I casi di indegnità nel diritto successorio romano* (1973) 123). This happened for example if a person disposed of inheritance he expected to inherit from a relative during the lifetime of the relative without his knowledge. Lack of respect would also have been present if a legatee started legal proceedings concerning the testator's status. A provincial official would be unworthy to inherit if he marries a woman outside of his province and a tutor would be unworthy if he marries his ward. (See Von Keller *Institutionen: Grundriss und Ausführgen* (1861) 406). A person who committed adultery with a woman whom he subsequently marries and instituted as his heir or *vica versa* would have been unworthy. (See Von Keller 406). A woman who lived with a soldier as his mistress and who inherits his property under a military will would have been unworthy to receive such an inheritance. (See Von Keller 407). Any party to an illegal marriage would be unworthy to inherit from his spouse and the same will go for a couple involved in an immoral sexual relationship. (See Windscheid and Kipp *Lehrbuch des Pandektenrechts* (1906) 727). An heir would be unworthy to inherit if he failed to look after a testator who is mentally ill or if he failed to ransom him from captivity. (See Windscheid and Kipp 724). Where a beneficiary failed, in spite of judicial admonition, to carry out the terms imposed upon him by the testator for example to honour legacies laid down in a will within a year; he will be unworthy to inherit from the testator. (See Windscheid and Kipp 726). A person whom the testator has appointed as guardian for his son and who excuses himself from taking over the guardianship would be unworthy. Such a person will forfeit the benefit to the son whose interests he had ignored. (See Voet *Commentarius ad Pandectas* (1829) 34 9 6). A mother failing to appoint a guardian for her children below the age of puberty would be unworthy to inherit from those children. (See Voet 34 9 6). When deadly enmities arose between a testator and a legatee, the legatee was unworthy to inherit from the testator. (See Voet 34 9 6). When a widow remarried within the year of mourning, she was regarded unworthy of all inheritances and legacies left to her in a will. (See Voet (1829) 24 9 6). Those who had been left something as reward for arranging the funeral of the deceased was also regarded unworthy to inherit from that deceased. (See Mackeldery *Lehrbuch des heutigen Römischen Rechts* (1933) 582).

⁵¹ The principle of primogeniture disqualifies almost all other beneficiaries (male and female) apart from the eldest son (or his eldest male descendant) from inheritance. This rule was declared unconstitutional in *Bhe v Magistrate, Khayelisha* 2005 (1) BCLR (CC). The position of children born out of wedlock is quite interesting. In general, a son born out of wedlock may never inherit from his mother; but he may ultimately inherit from his father if there is no child born inside of wedlock to inherit. This is an over-simplification of the rules, but since neither the Intestate Succession Act 81 of 1987 nor the Wills Act 7 of 1953 distinguish between children born in and out of wedlock anymore, any discrimination between children on these grounds would be regarded as unfair discrimination and would therefore be disallowed if detected. (See Paleker in Jameck *et al* 114). A

3 1 General unworthiness

General unworthiness is based on the rule that no person may be enriched by his own unlawful conduct, or benefit from conduct that is punishable.⁵² This is a wide concept and includes circumstances where there was not necessarily murder, but any type of reprehensible behaviour against the deceased by the beneficiary.⁵³ The beneficiary is then not allowed to inherit, or to receive any financial benefit that is associated or a consequence of the crime or offence that he committed.⁵⁴

3 2 Specific unworthiness

3 2 1 Introduction

Specific unworthiness deals with; *inter alia*, situations where the deceased is killed by the beneficiary. According to common law, a wrongdoer is unworthy to benefit either testate or intestate from his victim within the context of specific unworthiness.⁵⁵ Specific unworthiness includes crimes such as murder; conspiracy to murder; complicity to murder; assault with the intention to cause grievous bodily harm that leads to murder and culpable homicide.⁵⁶

3 2 2 Intentional killing

The rule precluding a killer from inheriting finds application in the Roman-Dutch law maxim, *de bloody hand neemt geen erf*. A person who causes the death of another is therefore not entitled to inherit as the heir or legatee of the person he killed.⁵⁷ A person who kills a *coniunctissimus*⁵⁸ of a testator is also unworthy to inherit from that testator. In *Ex parte Steenkamp and Steenkamp*⁵⁹ Steyn J had to decide whether a murderer has capacity to inherit from the heir of the murdered person, or whether the term *coniunctissimi* can be extended when applying the *bloedige hand* maxim. In terms of common law, *coniunctissimi* include spouses,

family head my during his lifetime, under certain circumstances, and according to the prescribed formalities, disinherit his son and exclude him from succession. If, for example, the son is guilty of serious misconduct making him unworthy to succeed his father as family head, he may be disinherited. (See Paleker in Jamneck *et al* 114).

⁵² Schoeman-Malan "Privaatregtelike perspektief op onwaardigheid om te erf – die uitwerking van gesinsmoorde" 2013 *LitNet Akademies* 113 114.

⁵³ *Taylor v Pim* (1903) 24 NLR 484 491.

⁵⁴ *Taylor v Pim* 484 491; *Pillay v Nagan* (2001) 1 SA 410 (D) 424.

⁵⁵ Schoeman-Malan 2013 *LitNet Akademies* 113 117.

⁵⁶ See ch 3 below.

⁵⁷ Grotius 2 28 42.

⁵⁸ A close family member of the deceased, namely a child, spouse or parent. See *Ex parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T) 748A.

⁵⁹ 1952 (1) SA 744.

parents and children of the deceased.⁶⁰ It is not, however, clear what the situation should be when a beneficiary kills the deceased's grandparents or grandchildren. In the *Steenkamp*-case the testators made a joint will dated 28 January 1938 and bequeathed their farm and certain movables to the children, born and unborn, of their daughter (second petitioner) and her husband (first petitioner). At the time of the execution of the will, the two petitioners only had one child, born on 17 February 1935; a second child was later born on 1 July 1939. On 3 December 1941, the first petitioner murdered both the testators and was convicted and sentenced to life imprisonment. After the death of the testators, on 25 April 1941, a third child was born. This child died on 8 October 1942 and medical evidence showed that the second petitioner was unable to have any more children. An application was brought to order that the three children of the petitioners be declared the only heirs of the deceased testators, and that, subsequent to the rules of intestate succession, the petitioners being the sole heirs of the deceased child.⁶¹ The curator appearing on behalf of the deceased child argued that the term *coniunctissimi* should be extended to include grandparents and grandchildren, and since Steenkamp had murdered the grandparents of the beneficiary (the deceased child), he should be unworthy to inherit. The curator argued that, even though common law referred to specific categories of people when making reference to the *coniunctissimus* of the deceased, the list was not closed and could be extended to accommodate the legal convictions of society.⁶² Steyn J held that the testators, who are the deceased child's grandparents, do not fall within the category of *coniunctissimi* and that the father is therefore not unworthy to inherit from the child.⁶³ Steyn J further held that, even if the father is not precluded under the *bloedige hand* maxim, he will also not be precluded from succeeding to the deceased child's estate by the rule that nobody may enrich himself by his own wrongful conduct or derive any benefit from conduct that is punishable, because the child's estate does not devolve upon him through his own wrongful conduct, but through the child's death.⁶⁴ Consequently, Steyn J states that perhaps it is possible to include grandparents and grandchildren as *coniunctissimi* of the deceased where the grandchildren were raised by the grandparents, but he is

⁶⁰ Paleker in Jamneck *et al* (eds) 105.

⁶¹ *Ex parte Steenkamp and Steenkamp* 744H.

⁶² *Ex parte Steenkamp and Steenkamp* 744H.

⁶³ *Ex parte Steenkamp and Steenkamp* 745A.

⁶⁴ *Ex parte Steenkamp and Steenkamp* 745B.

reluctant to decisively rule on this question.⁶⁵ According to the Dutch law, only the intentional killing of the deceased will lead to the unworthiness of a beneficiary, but not the killing of the *coniunctissimus* of the deceased.⁶⁶ Du Toit⁶⁷ argues that the South African common law position regarding the intentional killing of the *coniunctissimus* of a deceased is to be preferred.⁶⁸

The Australian law has a rule similar to the one discussed in the *Steenkamp*-case. The exclusionary principle can be applied where a person, who is entitled to an interest in property in remainder, whether the interest is under a will or a settlement, causes a premature vesting in possession of that interest by killing the holder of the prior interest.⁶⁹

Van Leeuwen⁷⁰ clearly states that both the killer and persons who help with the killing, or who gives counsel or assistance for the purpose, are disqualified from inheriting.⁷¹ The South African position is in line with section 1(2) of the *United Kingdom's Forfeiture Act* 1982. In terms of this section, a person who kills another will include persons who unlawfully aids, abet, counsel or procure the death of another.

Sometimes both specific and general unworthiness are mistakenly categorised under the *bloedige hand* maxim.⁷² De Waal and Zimmermann⁷³ indicate that the maxim is only one of the various grounds of unworthiness, and that it must only be seen as a “flowery expression that captured the imagination of the reader”.⁷⁴ The idea was

⁶⁵ *Ex parte Steenkamp and Steenkamp* 751H.

⁶⁶ Article 4 3 1 of the Burgerlike Wetboek (hereinafter referred to as ‘BW’).

⁶⁷ “Erfregtelike onwaardigheid: Enige lesse te leer vir die Suid-Afrikaanse reg uit die Nederlandse reg?” 2012 *Stellenbosch Regstydskrif* 137 142.

⁶⁸ Regardless of this void in the Dutch law, the courts do sometimes use the principle of reasonableness and fairness to exclude a beneficiary who killed a person closely related to the deceased. An example of this is the court in Amsterdam (Hof Amsterdam 15 Augustus 2002, *Nederlandse Jurisprudentie* 2003 53) that held that the principle of reasonableness and fairness dictated that a son who killed both of his parents is indeed unworthy to inherit from his grandparents. This illustrates that reasonableness and fairness is sometimes used by Dutch courts to temper the rigid prescriptions of the BW.

⁶⁹ *Cleaver v Mutual Reserve Fund Life Association* (1892) 1 QB 147 157.

⁷⁰ 3 3 9.

⁷¹ *Casey v The Master* 1992 (4) SA 505 (N) 507E.

⁷² De Waal and Zimmermann “The meaning and application of the *bloedige hand* rule in the Roman-Dutch and modern South African law of succession” in Mostert and De Waal (eds) *Essays in Honour of CG van der Merwe* (2011) 169 174.

⁷³ Mostert et al Waal (eds) *Essays in Honour of CG van der Merwe* (2011) 169 174.

⁷⁴ De Waal and Zimmermann in Mostert et al (eds) *Essays in Honour of CG van der Merwe* (2011) 169 174.

never to restrict the application of the rule to cases of killing involving bloodshed.⁷⁵ It seems as though the best way of categorising would be to list specific unworthiness under the *bloedige hand* maxim, since it involves cases of murder as well as culpable homicide.⁷⁶ Therefore it can be said that the working of the *bloedige hand* maxim is absolute, which means that it does not matter if killing was in the form of murder or culpable homicide.⁷⁷ It is important to note that a general unworthiness to inherit is not attached to a murderer. The unworthiness is only attached to the murderer's capacity to inherit from the victim, or if he killed the *coniunctissimus* of the deceased.

In *Ex parte Wessels and Lubbe*⁷⁸, Lubbe murdered his wife, children, mother and mother-in-law and then committed suicide. He and his wife left no surviving children or parents. Their only surviving relatives were sisters and brothers. They were married in community of property and left a mutual will under which, at the death of the first-dying, benefits were bequeathed to their children and the surviving spouse was appointed heir to the estate of the first-dying. The interesting question here is the devolution of the children's estates. The children died intestate, and the law of intestate succession indicates that a child's intestate estate will go to the parents in equal shares. The dispute was whether the whole of the children's estates will go to their mother's side, or will half also go to the unworthy father's side.⁷⁹ De Villiers J concludes that it is submitted that the legislature in enacting the Political Ordinance of 1580 does not intend that where one of the parents is dead and the other unworthy there should be a splitting-up of the estates, so as to entitle relatives of the unworthy person to the estate.⁸⁰ He also says to view an unworthy person as having died the moment he became unworthy should be rejected, as the legislature contemplates actual physical death only.⁸¹ He concludes that there must be an order that the assets of the joint estate of both the deceased and his wife must be divided as follows: half of the estate to the brother and sister of the deceased mother

⁷⁵ De Waal and Zimmermann in Mostert *et al* (eds) *Essays in Honour of CG van der Merwe* (2011) 169 174.

⁷⁶ See ch 3 par 3 below for a discussion on negligent killing.

⁷⁷ Matthaëus *Zinspreuken* 132.

⁷⁸ 1954 (2) SA 225 (O).

⁷⁹ *Ex parte Wessels and Lubbe* 229C.

⁸⁰ *Ex parte Wessels and Lubbe* 232B.

⁸¹ *Ex parte Wessels and Lubbe* 232A.

in equal shares and half to the brother and sisters of the unworthy deceased father in equal shares.⁸²

In *Marais v Botha*⁸³, the wife was convicted of her husband's murder. She brought an application in terms of section 2(3) of the Wills Act 7 of 1953 to condone the joint will in order to be appointed as an executor and receive a benefit according to the will.⁸⁴ Meer J correctly notes the following:

"I note also that a finding for the applicant would indeed be *contrary to the recognised Roman-Dutch law maxim of de bloedige hand neemt geen erf*. A finding in her favour could possibly lead to her being appointed executor of the joint will, and thereby in her capacity as such, receiving a benefit under the will."⁸⁵ (Emphasis supplied)

In *Gafin v Kavin*⁸⁶ Esselen J held that, even if the beneficiary only conspires with others to compass the testator's death, he as an unworthy person cannot inherit either testate or intestate, in accordance with the *bloedige hand* maxim. In *Caldwell v Erasmus*,⁸⁷ Blackwell J states that it would be preferable to come to the same conclusion on the principle followed in the English law, namely that it is against public policy⁸⁸ that a person who is guilty of criminally killing another should take any benefit from that person's estate or under that person's will.⁸⁹ In the case of *Re Crippen's Estate*⁹⁰ the Probate Court granted administration to the estate of an intestate wife to one of her next of kin, thereby passing over the husband, Dr Crippen, who had been found guilty of her murder and sentenced to death. The President of the Probate Division states that:

⁸² *Ex parte Wessels and Lubbe* 232C-D.

⁸³ 2008 (2) SACR 355 (C).

⁸⁴ This section gives the High Court the power to order the Master to accept a document which does not comply with the execution or amendment formalities as a valid will if it is satisfied that the testator intended the defectively executed document to be his will or an amendment to it. This power of the court is often referred to as the power of condonation and s 2(3) is often called the rescue provision. If the requirements of s 2(3) are satisfied, the court makes an order directing the Master to accept the will or amendment as if it were validly executed. S 4A of The Wills Act 7 of 1953 provides that a nomination in a will of a person as executor, trustee or guardian shall be regarded as a benefit to be received by such a person from that will and therefore s 4A(1) and (2) also apply to these persons.

⁸⁵ (2008) ZAWCHC 111 par [11].

⁸⁶ 1980 (3) SA 1104 (W).

⁸⁷ 1952 (4) SA 43 (T).

⁸⁸ See ch 3 and ch 4 below for a critical analysis of this tendency of the courts to rely on public policy to render a person unworthy to inherit.

⁸⁹ *Estate of Julian Bernard Hall, Deceased Hall v Knight and Baxter* 1914 P D.

⁹⁰ (1911) 108.

“It is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights. The human mind *revolts at the very idea* that any other doctrine could be possible in our system of jurisprudence”.⁹¹ (Emphasis supplied)

According to the Australian law, it is said that:

“If a death occur and a person is criminally responsible for that death, and the death is a material fact in vesting in possession of an interest in favour of such person, that interest is forfeited.”⁹²

This is the situation in cases of murder⁹³ as well as manslaughter.⁹⁴ The motive of the killer is immaterial.⁹⁵ It does not matter whether the reason was for the purpose of benefiting from the deceased estate or not.⁹⁶ According to the Islamic law, a relative disqualified by reason of some wrongdoing recognised by law, such as murder, cannot exclude⁹⁷ another heir.⁹⁸ For example: If a deceased leaves a husband, father and a son, and the son murdered the deceased, his mother, and is subsequently excluded. Had the son inherited, the husband would have taken one-quarter. The son’s exclusion does not operate to reduce the husband’s share. In the result, the husband takes one-half and the residue of one-half devolves upon the father.

⁹¹ (1911) 108.

⁹² *Re Tucker* (1920) 21 SR (NSW) 175 180. Therefore, if a beneficiary under a will or a person eligible to take on intestacy kills the testator or the intestate deceased, whether through murder or manslaughter, that person will be unworthy to claim under the will (see *Cleaver v Mutual Reserve Fund Life Association* (1892) 1 QB 147; *Re Crippen* (1911) P 108; *Re Barrowcliff* (1927) SASR 147) or from the intestate estate (see *Re Cash* (1911) 30 NZLR 577; *Re Tucker* (1920) 21 SR (NSW) 547; *Re Sigsworth* (1935) 1 Ch 89; *Re Pechar* (1969) NZLR 574; *Re Giles* (1972) Ch 544; *Re Dreger* (1976) 69 DLR 47). Requirements of public policy will always override the express provisions of the will (see *Cleaver v Mutual Reserve Fund Life Association* (1892) 1 QB 147 156, where the Forfeiture Act 1982 (UK) did not apply, it was held that a person barred by the forfeiture rule could not apply for an order under the Inheritance (Provision for Family and Dependents) Act 1975 (UK) because (i) that legislation was enacted against the background of the forfeiture rule, and (ii) the absence of reasonable financial provision for the applicant resulted from the forfeiture rather than the causes on which the court’s statutory jurisdiction was conditioned (see *Re Royse* (1984) 3 WLR 784).

⁹³ See *Re Cash* (1911) 30 NZLR 577; *Re Tucker* (1920) 21 SR (NSW) 175; *Re Sangal* (1921) VLR 355; *Re Pechar* (1969) NZLR 574; *Re Dreger* (1976) 69 DLR 47.

⁹⁴ See *In Estate of Hall* (1914) P 1; *Re Callaway* (1956) Ch 559 562; *Re Charlton* (1968) 3 DLR 623; *Re Giles* (1972) Ch 544. It has also been held that procuring the commission of suicide by the deceased provides a bar (see *Whitelaw v Wilson* (1934) 3 DLR 554).

⁹⁵ Hardingham and Neave *Wills and Intestacy in Australia and New Zealand* (1989) 242.

⁹⁶ See *Re Cash* (1911) 30 NZLR 577.

⁹⁷ In the Islamic law, there are two classes of exclusion: partial and absolute. Partial exclusion refers to an exclusion from a larger share and an admission to a smaller one. There are five Quranic heirs who are subject to partial exclusion husband, wife, mother, son’s daughter and consanguine sister. (See Omar *The Islamic Law of Succession and its application in South Africa* (1988) 89.

⁹⁸ Omar 89 90.

3 2 3 Extension of the *bloedige hand* maxim to cases of negligent killing.

Culpable homicide is defined as the unlawful and negligent killing of another human being.⁹⁹ Wood-Bodley¹⁰⁰ questions whether forfeiture will result from all cases of killing, including unlawful killings that constitute neither murder nor culpable homicide. Van der Walt and Sonnekus¹⁰¹ argue that forfeiture should not result from a death caused by ordinary negligence, but should result only if there is an element of morally unacceptable conduct involved. They argue that this is in line with the Roman- Dutch approach to negligence in which a subjective test for negligence is employed so that forfeiture only results in cases of morally unacceptable conduct.¹⁰² In 1991, the South African Law Commission¹⁰³ (now the Law Reform Commission), recommended the introduction of a section into the Wills Act 7 of 1953 dealing with the incapacity to inherit. The report on reform suggests that disqualification in cases of negligent killing should only take place where there is assault involved.¹⁰⁴ De Waal and Zimmermann¹⁰⁵ point out that this will clearly exclude cases of culpable homicide, for example causing a fatal accident due to the negligent driving of a motor vehicle.¹⁰⁶ They say that the courts have been able to take into account the degree of negligence involved. However, the proposed section was not included in legislation. The common law position regarding the *bloedige hand* maxim remains in force.¹⁰⁷ De Waal and Zimmermann¹⁰⁸ state that it is safe to say that, in Roman- Dutch law, the rule does not apply only in the case of intentional killing, but also apply when the deceased's death had been brought about through negligence.¹⁰⁹

⁹⁹ *S v Naidoo* 2003 (1) SACR 347 (SCA).

¹⁰⁰ "Forfeiture by a beneficiary who conspires to assault with intent to do grievous bodily harm: *Danielz NO v De Wet* 2009 (6) SA 42 (C)" 2010 *SALJ* 30.

¹⁰¹ "Die nalatige bloedige hand – neem dit erfenis?" 1981 *TSAR* 30.

¹⁰² Van der Walt and Sonnekus "Die nalatige bloedige hand – voor die Hof én die Wetgewer" 1981 *TSAR* 30 38.

¹⁰³ *SALC Review of the Law of Succession* 1991 par 4 14.

¹⁰⁴ *SALC Review of the Law of Succession* 1991 par 4 13 – 4 23.

¹⁰⁵ Mostert *et al* (eds) *Essays in Honour of CG van der Merwe* (2011) 169 179.

¹⁰⁶ In other words – cases of so-called technical negligence.

¹⁰⁷ This can be welcomed as far as the position of the intentional killer is concerned, for it has been argued, with justification, that the proposed section would have gone too far in allowing murderers to inherit – see for example Skeen "Unworthiness through negligence" 1993 *SALJ* 446 448; Van der Walt en Sonnekus "Die nalatige bloedige hand – voor die Hof én die Wetgewer" *TSAR* 147 153.

¹⁰⁸ Mostert *et al* (eds) *Essays in Honour of CG van der Merwe* (2011) 169 173.

¹⁰⁹ De Waal and Zimmermann in Mostert *et al* (eds) *Essays in Honour of CG van der Merwe* (2011) 169 173. Voet made this rather clear, (34 9 6) and the same can be inferred from the more general formulations by De Groot (2 24 4 28 42). Any remaining doubt is removed by the explicit statements to this effect in the works of Mattheus (*Zinspreuken* 132 *De Criminibus* 48 5 4) and by the fact that, apart from Voet, (34 9) well-known authors such as Van Bynkershoek (*Quaestiones Juris Privati* 3 9) and Van der Keesel (*Praelectiones* 2 24 24) relied in their expositions of this issue on Mattheus.

De Waal and Zimmermann note that this gives a fairly wide field of application on the rule and that it also raises a further question, namely whether every negligent killing will disqualify a person from inheriting or whether only negligence of a serious nature will result in unworthiness.¹¹⁰ According to the Roman-Dutch law, a subjective test should be applied for negligence so that forfeiture only results in cases of morally reprehensible conduct.¹¹¹ Huber¹¹² expresses the view that only gross negligence is sufficient to declare a beneficiary unworthy to inherit.

De Waal and Zimmermann¹¹³ question whether every negligent killing disqualifies a person from inheriting or whether the courts have discretion in this regard. The principle that negligent killing results in forfeiture in modern South African law is acknowledged by McLaren J in *Casey v The Master*,¹¹⁴ the only South African case in which this question is pertinently raised. The deceased and her husband were married in community of property and in 1985 they executed a joint will in terms of which the surviving spouse was appointed heir of the first-dying. One evening in February 1989 the husband cleaned his loaded pistol in the spouse's bedroom. He was intoxicated at the time, and while handling the gun, the hammer slipped from the grasp of his thumb and the pistol discharged one round. At the time, his wife was lying on the bed. She got struck and killed. It was common cause that even though he was intoxicated at the time, his level of intoxication was such that he was still able to understand the nature and consequences of his actions.¹¹⁵ He was found guilty of culpable homicide. He was sentenced to three years imprisonment, which was wholly suspended. McLaren J had to decide whether the husband could inherit the half-share of the estate bequeathed to him in the joint will. As a point of departure, McLaren J states that there is no South African judicial precedent directly dealing with the question of whether a person who negligently caused the death of another can benefit from the latter. The beneficiary approached the high court to relax the *bloedige hand* maxim so that it will not be applicable in cases of negligent killing. McLaren J rejects this argument and the disqualification remained. In delivering

¹¹⁰ At least one author, Huber, indicated that not every type of negligence sufficed but that negligence approaching *dolus* was required (*Praelectiones* 36 9 2).

¹¹¹ Van der Walt and Sonnekus 1981 *TSAR* 30 39-40.

¹¹² *Praelectiones* 36 9 2.

¹¹³ Mostert *et al* (eds) *Essays in Honour of CG van der Merwe* (2011) 169 177.

¹¹⁴ 1992 (4) SA 505 (N).

¹¹⁵ *Casey v The Master* 507G.

judgment, he refers to several cases¹¹⁶ in which courts made indirect references to death caused by negligence as a ground for unworthiness to inherit. On the bases of a study of academic contributions and *obiter dicta* in a number of cases,¹¹⁷ McLaren J reaches two key conclusions. The first is a confirmation that the Roman-Dutch authors do indeed support the application of the *bloedige hand* maxim in cases of negligent killing. The second is that the Roman-Dutch rule that no-one should be allowed to benefit from his own wrongful conduct has not become obsolete in modern South African law. McLaren J is convinced that both principle and public policy dictate the rule should still be applied in modern law.¹¹⁸ McLaren J does not explain the exact scope of the disqualification in cases of negligent killing. He simply suggests that disqualification in all cases of negligence would not be desirable. In this regard McLaren J seems to accept the distinction between instances such as motor vehicle accidents in which the negligence is normally of a so-called technical nature and situations in which an element of moral blameworthiness is present.¹¹⁹ Disqualification will, accordingly, only be appropriate in the latter instance. In the case at hand, however, McLaren J held that it is unnecessary to decide the issue. He indicates that whether there was indeed a need for relaxation of the rule in certain cases is a matter to be addressed by the legislature. The husband's conduct in the current case is clearly not only a case of technical negligence, and he was disqualified to inherit from his wife. McLaren J agrees with the views expressed by Van der Walt and Sonnekus¹²⁰ that the *bloedige hand* maxim should be relaxed in certain cases. These academic writers argue that cases of technical negligence¹²¹ should not fall under the application of the *bloedige hand* maxim. The mutual example recognised by the writers where the rule should be relaxed is in motor vehicle accidents.¹²² McLaren J agrees that the *bloedige hand* maxim is harsh and out of touch with the spirit of modern times, and that the relaxation of the maxim in circumstances recognised by these academic writers or in cases where public policy

¹¹⁶ See for example *Taylor v Pim* 492 and 496-497; *Ex parte Steenkamp and Steenkamp* 748C; *Caldwell v Erasmus* 149D-G.

¹¹⁷ *Taylor v Pim* (1903) 24 NLR 484; *Caldwell v Erasmus* 1952 (4) 43 (T); *Nell v Nell* 1976 (3) SA 700 (T).

¹¹⁸ *Casey v The Master* 510G.

¹¹⁹ *Casey v The Master* 510I.

¹²⁰ Van der Walt and Sonnekus 1981 TSAR 30 31.

¹²¹ Van der Walt and Sonnekus 1992 TSAR 147. For example when the driver of a car causes an accident through negligence and as a consequence the passenger dies, then if the driver was either a testate or intestate beneficiary of the deceased, he would be unworthy to inherit from him.

¹²² Paleker in Jamneck *et al* (eds) 107.

favours the modification of the maxim should be permitted. McLaren J is not prepared to accept the modification to the test for exclusion suggested by Van der Walt and Sonnekus,¹²³ and indicates that in his view forfeiture follows even from a death caused by negligent driving in the circumstances described by the authors.¹²⁴

In reaching a decision, McClarin J refers to the English case of *In the Estate of Hall, Hall v Knight and Baxter*,¹²⁵ where the court of Appeal confirms the judgment of Sir Samuel Thomas Evens in the court *a quo*. In this case, a woman, one of the possible beneficiaries, was found guilty of manslaughter of the testator, and the court had to decide if she was worthy to inherit in terms of the will. The court held that the issue must be decided according to public policy¹²⁶ and that public policy does not differentiate between a beneficiary that was found guilty of murder and one that was found guilty of manslaughter. The court concludes that consequently, a beneficiary who was found guilty of manslaughter is also unworthy to inherit. At 6 Cozens-Hardy MR observes:

“It is said that that was a case of murder and not manslaughter. I entirely fail to appreciate that distinction. It was a case of felony and I see no reason to draw a distinction between murder and manslaughter in a case like this.”¹²⁷

Van der Walt and Sonnekus¹²⁸ note that none of the judges take into account the arguments of the advocates for the appellants, who say that the unworthiness principle should not be applied to all cases of negligent killing. The person who negligently causes a motor vehicle accident must not be found unworthy if such a finding will be against the public policy. The cases of *Re Callaway, Callaway v Treasury Solicitor*¹²⁹ and *Re Giles, Giles v Giles*¹³⁰ rule that there should not be a distinction between a murderer and a person who causes the death of another negligently. Both of these classes of people should be unworthy to inherit.

¹²³ 1992 TSAR 147.

¹²⁴ Van der Walt and Sonnekus suggested that if a car leaves the road and overturns on a bend, killing the passenger, the driver should not be excluded from inheriting from the passenger. See Van der Walt and Sonnekus 1981 TSAR 30 39.

¹²⁵ 1914 P 1 CA.

¹²⁶ This is not necessarily a good example to be followed by South African courts when deciding on the possible unworthiness of a beneficiary. The term “public policy” is very broad and subjective and it is difficult to reconcile it with legal certainty.

¹²⁷ *Estate of Hall, Hall v Knight and Baxter* 510D-E.

¹²⁸ 1981 TSAR 30 41.

¹²⁹ 1956 452I.

¹³⁰ 1972 CH 544.

Van Der Walt and Sonnekus¹³¹ say that it is often insightful to compare a new norm in the South African law to the current situation in Dutch law, since the two legal systems have the same origin.¹³² In the Dutch law, the unworthiness principle is not applied to a person who negligently causes the death of someone else.¹³³ It is clear that the Dutch law does not follow the same approach to negligent killing as the South African law. Van der Walt and Sonnekus¹³⁴ observe that it seems as though the emphasis in Dutch law is no longer on the moral blameworthiness of a person's conduct, but rather on his criminal conviction.¹³⁵

The uncertainty regarding the position of negligent killing remains problematic. De Waal and Zimmermann¹³⁶ rightly observe that this issue causes considerable uncertainty in modern South African law. The proposed idea that only negligent killing involving assault will lead to disqualification is not ideal and has no common law basis. This will, for example, have the consequence that in a scenario similar to the one in the *Casey*-case, the husband will not be disqualified, because there is no assault.¹³⁷ De Waal and Zimmermann¹³⁸ suggest that such an outcome will probably be against the *boni mores* of society and will widely be regarded as unjust. McLaren J is sympathetic to the relaxation of the *bloedige hand* maxim in circumstances recognised by the academic writers or in other cases where public policy favours the amendment of the rule, but nevertheless held that if the rule is severe and out of touch with the spirit of our times, it is the responsibility the legislature to reform the law and not the courts.¹³⁹ Skeen¹⁴⁰ argues that legislation similar to the United Kingdom's *Forfeiture Act* 1982, relating only to negligent killings, can successfully be passed in South Africa. However, De Waal and Zimmermann¹⁴¹ argue that it seems unnecessary to fall back on that rather complex Act to achieve a fundamentally

¹³¹ 1981 TSAR 30 42.

¹³² Van der Walt and Sonnekus 1981 TSAR 30 42.

¹³³ Article 885 BW.

¹³⁴ 1981 TSAR 30 39 42.

¹³⁵ Although a criminal conviction might be taken into account in the civil case, in the South African law it is not a prerequisite to find a person unworthy to inherit from the deceased whose death he caused.

¹³⁶ Mostert *et al* (eds) *Essays in Honour of CG van der Merwe* (2011) 169 173.

¹³⁷ Van der Walt and Sonnekus 1992 TSAR 147 153.

¹³⁸ Mostert *et al* (eds) *Essays in Honour of CG van der Merwe* (2011) 169 179.

¹³⁹ *In the Estate of Hall, Hall v Knight and Baxter* 1914 P 1 CA 510H-J.

¹⁴⁰ "Unworthiness through negligence" 1993 SALJ 446.

¹⁴¹ Mostert *et al* (eds) *Essays in Honour of CG van der Merwe* (2011) 169 179.

modest aim. They state that a simple statutory provision granting the courts discretion whether or not to allow a negligent killer to take a benefit from the estate of the deceased will be sufficient. Van der Walt and Sonnekus¹⁴² propose that legislation alleviating the position of the beneficiary who negligently causes the death of the testator is unnecessary in cases of technical negligence. The moral blameworthiness¹⁴³ of the killer is a matter for judicial discretion because they argue that such determination takes the form of an objective valuation of the community's feelings of what is morally offensive.¹⁴⁴ Due to the lack of court cases dealing with negligent killing and disqualification, it seems as though courts will have a wide discretion whether to allow the killer to inherit on the basis of his moral blameworthiness.

The question whether the forfeiture will be instituted in cases of negligent killing evokes different answers in different jurisdictions. In England, moral culpability is irrelevant.¹⁴⁵ In New South Wales the case of *Public Trustee v Evans*¹⁴⁶ explains the law. Young J held that the degree of criminality is relevant in the subsequent civil proceedings. A husband threatened to kill his wife and her children, and as a result of the threat, the wife shot and killed him. On her trial for manslaughter, the judge discharges the jury from giving any verdict, which operates under statute as an acquittal. Young J expresses the opinion that the forfeiture rule is a judge-made rule of public policy that allows a judge to consider the fact that unfortunate situations may occur in families whereby a death unfortunately occurs because of domestic violence. He held that, as the situation in this case, it is clear that there should be only a nominal punishment; the forfeiture rule should not be applied. Kearney J refers to the situation in the American courts, where the consideration is the matter of unjust enrichment. He interprets the proper basis of the rule of public policy as being the unconscionability of allowing a person to take a benefit through a crime. The court must not only determine the nature of the crime, but must also look at the

¹⁴² 1992 TSAR 147 153.

¹⁴³ According to De Waal and Zimmermann, the criterion of moral blameworthiness remains commendable. Apart from finding support in the writings of the Roman-Dutch authors, it would also provide a workable and flexible test in practice. (Mostert *et al* (eds) *Essays in Honour of CG van der Merwe* (2011) 169 179).

¹⁴⁴ 1992 TSAR 147.

¹⁴⁵ *Re Giles* (1972) Ch 544 citing *Re Hall* (1914) P 1 7; *Gray v Barr* (1971) 2 QB 554 558; *Re K decd* (1985) Ch 85 97-98 affirmed without consideration of the present point (1968) Ch 180; Toohey, "Killing the Goose that Lays the Golden Eggs" (1958) 32 ALJ 14; Miller "Slaying a Testator" (1972) 35 Mod LR 426; Youdan "Acquisition of Property by Killing" (1973) 89 LQR 235.

¹⁴⁶ (1985) 2 NSWLR 188.

circumstances surrounding the crime in order to evaluate the moral culpability to be attributed to the offender. In the Dutch law, Article 431 of the *BW* only deals with intentional killing, but does not recognise culpable homicide as a ground for unworthiness. In this regard, the Dutch law seems to differ from the South African position.¹⁴⁷

3 2 4 Lack of capacity to act

Capacity to act means that the person must be able to understand his actions and in addition, the person must have the ability to act in accordance with that appreciation.¹⁴⁸ The killer must have a blameworthy state of mind.¹⁴⁹ Thus, if a beneficiary kills the testator, but he is unable to understand that his actions are wrongful, or he is unable to act according to this knowledge, he lacks criminal capacity and therefore also capacity to act. Such a person cannot be found guilty of a crime, since one of the essential elements of a crime is missing.¹⁵⁰ It is unclear whether this same test can be used to exclude the application of the *bloedige hand* maxim; however, the courts seem to be unwilling to declare someone unworthy to inherit if that person lacked capacity to act.¹⁵¹ Examples of situations that will exclude capacity to act are youth,¹⁵² mental illness¹⁵³ and intoxication.¹⁵⁴

¹⁴⁷ Van Dijk (See *Strafrechtelijke Aansprakelijkheid Heroverwogen* 2008 239-240) points out that the concept of intention in the Dutch law is very broad, and incidents that were categorised under negligence in, for example, the American law, can sometimes be categorised under intention in the Dutch law. Therefore, it is possible that a situation similar to the one in the *Casey*-case might be categorised under intent according to the Dutch law, and therefore still result in unworthiness. (See Du Toit 2012 *Stellenbosch Regstydskrif* 137 141.)

¹⁴⁸ Snyman *Criminal law* (2014) 156.

¹⁴⁹ Corbett *et al* (2001) 82.

¹⁵⁰ Snyman 156.

¹⁵¹ *Ex parte Meier* 1980 (3) SA 154 (T); *Gafin v Kavin* 1980 (3) SA 1104 (W).

¹⁵² According to s 7 of the Child Justice Act 75 of 2008 there is an irrebuttable presumption that a person below the age of ten years lacks capacity to act and a rebuttable presumption that a person between the ages of twelve and fourteen years lacks capacity to act. Any person above the age of fourteen will be treated as an adult for purposes of criminal capacity.

¹⁵³ S 78(1) of the Criminal Procedure Act 51 of 1977 provides that a person who commits an act which constitutes an offence will be seen as mentally ill if that person is not able to understand the wrongfulness of his conduct, or unable to act in accordance with this knowledge. In the case of *Gafin v Kavin* 1980 (3) SA 1104 (W), a husband shot and killed his wife and two children. The court concluded that the husband was mentally ill at the time of the shooting and thus unaccountable for his actions. In the civil case it was held that he could inherit from his deceased spouse. Esselen J said that it can be mentioned as a matter of interest that, according to the English law, a person who is convicted of murder and then found to be mentally insane at the time of the act will not be prevented from taking a benefit under the deceased's will or according to the law of intestate succession, because of the fact that it will not be against public policy. In *Ex parte Meier* 1980 (3) SA 154, the question arose as to whether a son can inherit from his father whom he had killed. Because of the fact that the son was mentally ill, it was held that the son was indeed allowed to inherit from his deceased father. In the English case of *Dalton v Latham* (2003) EWHC 796 (Ch) Mr Justice Patten considered that a

If a killer is insane in accordance with the requirements of the Australian M’Naghten Rules¹⁵⁵ at the time of the killing, the person is seen as innocent in this context and will be able to succeed to the deceased’s estate.¹⁵⁶ There is a rebuttable presumption of sanity, and whoever alleges that the killer was not sane, must prove that he was insane in the relevant sense, at the material time. This must be proven, as in the South African law, on a balance of probabilities.¹⁵⁷

3 2 5 Possible justification grounds

The existence of a justification ground excludes the element of wrongfulness, and consequently also excludes the existence of a crime or delict.¹⁵⁸ If a beneficiary kills someone, but there is a justification ground for this conduct, then that person cannot be unworthy to inherit from the deceased, since the *bloedige hand* maxim is only applicable to blameworthy conduct. Examples of situations that will exclude unlawfulness are private defence¹⁵⁹ and necessity.¹⁶⁰

finding of criminal insanity may be the only possible exception to the rule that all unlawful killing, including manslaughter by reason of diminished responsibility or provocation.

¹⁵⁴ In the case of *S v Chretien* 1981 (1) SA 1097 Rumpff HR held that, if a person who commits an act while being so drunk that he is unable to appreciate that his actions are wrongful or that his inhibitions have substantially disintegrated, it is possible that he cannot be criminally responsible for these actions. According to the Dutch law, intoxication will exclude criminal liability in cases where a person is intoxicated to such an extent that he does not understand his own actions (s 37 *Het Wetboek van Strafrecht* 197). However, the Dutch law does sometimes move away from this rule on grounds of public policy (*Hazenwinkel-Suringa Inleiding tot de Studie van Het Nederlandse Strafrecht* 1975 249).

¹⁵⁵ *M’Naghten’s Case* (1843) 10 Cl & Fin 200; 8 ER 718.

¹⁵⁶ *Re Pitts* (1931) 1 Ch 546; *Re Plaister* (1943) 34 SR (NSW) 547; *Re Pollock* (1941) Ch 219; *Re Beiers* (1954) QWN 9; *Re Batten’s Will Trusts* (1961) 105 SJ 529; *Nordstrom v Baumann* (1962) SCR (Can) 147; *Clift v Clift* (1964-1965) NSWLR 1896; *Re Pechar* (1969) NZLR 574; *Re Dreger* (1976) 69 DLR 47.

¹⁵⁷ See *Re Pechar* (1969) NZLR 574.

¹⁵⁸ *Snyman* 241-242.

¹⁵⁹ Private defence is used to protect a legal interest that is under attack. According to the common law, private defence will only succeed if the attack on the accused is unlawful; if the defender directs his defence against the attacker and if the defensive action is reasonable. Unnecessary force to defend will not constitute as private defence.

¹⁶⁰ The defence of necessity is usually used in a situation where a person’s legal interests are under attack through no fault of his own and it is necessary to hold off the attack. In other words, the accused did not cause the situation that led to his conduct and there was no other way to prevent the threat against his life or property or other legally recognised interest. To defend herself, a person may be forced to commit acts usually regarded as criminal acts. The defence of necessity has the following characteristics: The threat to the accused may arise due to the actions of another person or by circumstances beyond his control and the attack or threat against the accused is so serious that it required him to break the law. Usually, when an accused raises the defence of necessity, an innocent person has suffered harm as a result of a defender’s actions. See *Snyman* 113.

3 2 6 Causation

Whilst the element of causation is clearly developed in the case of a crime or delict, it is not as easily interpretable in the law of succession. The only reported case that deals with causation for the purposes of the law of succession is the case of *Ex parte Steenkamp and Steenkamp*¹⁶¹. This case gives rise to two important legal questions regarding causation: Firstly, is it appropriate for Steenkamp to inherit from the child if he murdered the child's grandparents, and secondly, if he does inherit, is the benefit directly derived from the murders? Because the common law is silent on this situation, the court has a wide discretion in making a decision. Steyn J held that it is improbable that Steenkamp, at the time of the murders, could reasonably have foreseen the possibility of this child dying before him as this is not an ordinary and natural occurrence. There is no causal relationship between the murder and the enrichment. The factual cause of the enrichment is the birth and death of the child and not the death of the testators. The birth and death of the child is a new intervening action that breaks the legal chain of causation between the murder and the enrichment. Steenkamp and his wife are declared the intestate heirs of the deceased child's estate.¹⁶² The judgment is criticised by Hahlo,¹⁶³ who argues that the birth and death of the child is in fact the immediate cause of Steenkamp's enrichment. If Steenkamp did murder the testators, they would have most probably survived the child, and Steenkamp would not have succeeded directly or indirectly. He states that the murder and enrichment are sufficiently connected to make the *bloedige hand* maxim applicable¹⁶⁴

According to the Australian law a beneficiary will only forfeit the claim if the benefit is a direct result from the crime. The acquisition must be present before the rule operates.¹⁶⁵ In Canada, the position is rather interesting. If the testator makes the will after the wrongdoing has been done, the beneficiary is not disqualified.¹⁶⁶

¹⁶¹ 1952 (1) SA 744 (T). See par 3 2 2 above for the facts of this case.

¹⁶² Paleker in Jamneck *et al* (eds) 108.

¹⁶³ "The bloedige hand erft niet" 1952 SALJ 138.

¹⁶⁴ Paleker in Jamneck *et al* (eds) 108.

¹⁶⁵ Hardingham Neave Ford *Wills and Intestacy in Australia and New Zealand* (1989) 242.

¹⁶⁶ *Lundy v Lundy* (1895) 24 SCR 650 653.

3 2 7 Onus of proof and evidence

Whoever alleges that a wrongdoer is unworthy has the onus to object to the liquidation and distribution account and approach the court for assistance.¹⁶⁷ We find the explanation for this general rule in the case of *Casey v The Master*,¹⁶⁸ where there was a dispute regarding who bore the onus of proof – was it the party alleging the disqualification on account of the killing? Because of the general rule that any person can benefit under a will,¹⁶⁹ McLaren J held that the onus of proof is always on the party that maintains that another party is disqualified from taking a benefit under a will.¹⁷⁰

Schoeman-Malan¹⁷¹ argues that, in theory, the principle of unworthiness should apply automatically in cases where a person is first criminally charged.¹⁷² Due to the automatic application thereof, the executor must have knowledge of the unworthiness principle and all the other relevant aspects for purposes of the drafting of the liquidation and distribution account. This, however, leads to uncertainties in practice and litigation, because an executor is not necessarily able to decide over wrongfulness or guilt of the potential heirs.¹⁷³

A problem arises if the estates of multiple family members have to be administered simultaneously, because the role of the Master and the executor becomes especially intricate. Although the rules of unworthiness are not problematic, it is difficult for people who do not necessarily have the required legal background to apply these principles, because they are not always familiar with the applicable legal principles.¹⁷⁴ It is suggested that statutory reform be considered in order to codify the existing common law position regarding the administration of a deceased estate in cases where a beneficiary is unworthy to inherit.¹⁷⁵ However, even with no current legislation in place, the Administration of Estates Act 66 of 1965 states that the court has discretion and final say in matters of the administration of deceased estates.

¹⁶⁷ Schoeman-Malan 2013 *LitNet Akademies* 113 116.

¹⁶⁸ 1992 (4) SA 505 (N).

¹⁶⁹ See par 1 above.

¹⁷⁰ Paleker in *Jamneck et al* (eds) 106.

¹⁷¹ 2013 *LitNet Akademies* 113 122

¹⁷² SALC 1991 par 4 7 even states that a wrongdoer will be seen as unworthy until the opposite is proven. See also Van der Walt and Sonnekus 1981 *TSAR* 30.

¹⁷³ SALC 1991 par 4 8. See also *Beeld* (2013c).

¹⁷⁴ Schoeman-Malan 2013 *LitNet Akademies* 113 115.

¹⁷⁵ Schoeman-Malan 2013 *LitNet Akademies* 113 116.

Therefore the executor should approach the court for an appropriate declaratory order if there is a need for it.¹⁷⁶

The South African position is similar to the one in Australia, where the standard of proof is also on a balance of probabilities, but taking into consideration the gravity of the issues involved.¹⁷⁷

3 2 8 Is a criminal conviction a prerequisite for disqualification?

The question arises of whether a criminal conviction is a prerequisite for disqualification. The courts firmly held that the answer is no,¹⁷⁸ unlike the position in the Netherlands where a beneficiary must first be criminally convicted of a crime before it is possible to declare him unworthy to inherit from his victim.¹⁷⁹ This will have the consequence that a person might be acquitted on a criminal charge, but are still disqualified from inheriting if it can be established on a balance of probabilities that he unlawfully caused the death of the deceased.¹⁸⁰

This issue came up in *Leeb v Leeb*.¹⁸¹ The applicant sought an order to declare a beneficiary unworthy. The only evidence that the applicant was able to put before the court, was that the respondent had been convicted of the murder of the deceased. Thirion J held that a guilty verdict in a criminal case is insufficient evidence that he must be unworthy to inherit.¹⁸² This is because the onus of proof for a criminal case is different from that of a civil case. In a criminal case, guilt must be proven beyond reasonable doubt and in a civil case, responsibility for the death of the deceased must be proven on a balance of probabilities. Thirion J held that evidence has to be led anew in the civil matter to prove on a balance of probabilities that she committed the murder.¹⁸³

If we look at the amount of criminal cases and news reports about domestic murders, it seems strange that there are only a few civil cases that deal with unworthiness to

¹⁷⁶ Schoeman-Malan 2013 *LitNet Akademies* 113 116.

¹⁷⁷ *Helton v Allen* (1940) 63 CLR 692; *Re Dellow* (1964) 1 WLR 451; *Re Pechar* (1969) NZLR 574; *Public Trustee v Fraser* (1987) 9 NSWLR 433.

¹⁷⁸ *Casey v The Master* 1992 (4) SA 505 (N) 511D; *Caldwell v Erasmus* 1952 (4) SA 43 (T) 49; *Ex parte Vonzell* 1953 (1) SA 122 (C) 125.

¹⁷⁹ Sonnekus and Van der Walt 1992 *TSAR* 147 148.

¹⁸⁰ Paleker in Jamneck *et al* (eds) 107.

¹⁸¹ 1999 (2) All SA 588 (N).

¹⁸² *Danielz NO v De Wet* 2009 (6) SA 42 (C) 46A-F.

¹⁸³ See also *Danielz NO v De Wet* 46A-F.

inherit or to take other benefits. The amount of murders that are reported in comparison with the few civil cases that we hear about in the news can surely not be a reflection of the application of the unworthiness principle, or other extensions in the application thereof.¹⁸⁴ It seems as though the unworthiness principle does not always find application in practice as it should. The lack of reported civil cases suggests one of two extremes in practice: either the unworthiness principle is applied without any problems, or the principle is not applied in all cases and consequently benefits befall unworthy persons.¹⁸⁵ It seems to be the latter¹⁸⁶, and this is a problem that needs to be addressed by the legislator.

It is noticeable that criminal cases that did have an aftermath in the civil court regarding the *bloedige hand* maxim, or general unworthiness, are usually cases where the spouse was found guilty of murder in the criminal case as in *Ex parte Wessels NO and Lubbe*;¹⁸⁷ *Nell v Nell*;¹⁸⁸ *Ex Parte Vonzell*;¹⁸⁹ *Casey v The Master*;¹⁹⁰ *Danielz NO v De Wet*;¹⁹¹ *Makhanya v Minister of Finance*;¹⁹² *Leeb v Leeb*;¹⁹³ *Marais v Botha*;¹⁹⁴ *Gafin v Kavin*;¹⁹⁵ *Caldwell v Erasmus*;¹⁹⁶ *Ex Parte Meier*;¹⁹⁷ *Ex parte Steenkamp and Steenkamp*.¹⁹⁸

The South African position is in line with the rule in Australia. In *Hollington v Hewthorn*¹⁹⁹ it is confirmed that conviction or acquittal in criminal proceedings cannot be relied upon as sufficient evidence in the civil proceedings. It is interesting to note that the Court of Appeal in New Zealand does not follow the same rule as in

¹⁸⁴ See ch 4 for a detailed discussion of extending the grounds of unworthiness to fields outside the law of succession.

¹⁸⁵ Schoeman-Malan 2013 *LitNet Akademies* 113 123.

¹⁸⁶ Schoeman-Malan 2013 *LitNet Akademies* 113 123.

¹⁸⁷ 1954 (2) SA 225 (O). See discussion of this case in par 3 2 2 above.

¹⁸⁸ 1976 (3) SA 271 (T). See discussion of this case in ch 4 par 2 below.

¹⁸⁹ 1953 (1) SA 122 (C). See discussion of this case in ch 4 par 2 below.

¹⁹⁰ 1992 (4) SA 505 (N). See discussion of this case in par 3 2 3 above.

¹⁹¹ 2008 (4) All SA 549 (C). See discussion of this case in ch 3 par 4 2 below.

¹⁹² 2001 (2) SA 1251 (D). See discussion of this case in ch 4 par 4 below.

¹⁹³ 1999 (2) All SA 588 (N). See discussion of this case in par 3 2 8 above.

¹⁹⁴ (2008) ZAWCHC 111. See discussion of this case in par 3 2 2 above.

¹⁹⁵ 1980 (3) SA 1104 (W). See discussion of this case in 3 2 2 above.

¹⁹⁶ 1952 (4) SA 43 (T). See discussion of this case in par 3 2 2 above.

¹⁹⁷ 1980 (3) SA 134 (T).

¹⁹⁸ 1952 (1) SA 744 (T). See discussion of this case in par 3 2 2 above.

¹⁹⁹ (1943) 1 KB 587.

Australia.²⁰⁰ In New Zealand, a conviction or acquittal in the criminal proceedings will be allowed as evidence in the subsequent civil proceedings.²⁰¹

4 Consequences of unworthiness

4 1 The *bloedige hand* will be unworthy to inherit testate or intestate

In *Gafin v Kavin*²⁰² the court held that:

“It is trite law that, where a beneficiary either murders a testator or conspire with others to compass his death, he as an indignus *cannot inherit either ab intestate or in terms of the will*, in accordance with the maxim ‘de bloedige hand neemt geen erfenis.’²⁰³ (Emphasis supplied)

It is clear from this decision that it doesn’t matter whether the deceased left a will or not, nobody that contributes to his death will be allowed to inherit from him.

4 2 Other forfeited benefits

A person that is disqualified from inheriting will not only be prohibited from inheriting, but also from taking any other benefit from the estate.²⁰⁴ Examples of such benefits are executorship, trusteeship, benefits allocated in capacity as trust beneficiary and donations out of an estate.²⁰⁵

4 3 Representation

According to section 1(6) and 1(7) of the Intestate Succession Act 81 of 1987 if a person is unworthy to be an heir of an intestate estate of a deceased, any benefit that he would have received if he was not unworthy will be distributed as if he had died immediately before the deceased, and if applicable, as if he was not unworthy. This means that the disqualified heir is deemed to have predeceased the deceased. The disqualified heir’s descendants will then inherit through representation *per stripes*²⁰⁶. If the disqualified heir does not have any descendants, then that heir’s

²⁰⁰ *Jorgensen v News Media* (1969) NZLR 961; *Re Cash* (1911) 30 NZLR 577.

²⁰¹ *Jorgensen v News Media* (1969) NZLR 961.

²⁰² 1980 (3) SA 1104 (W).

²⁰³ *Gafin v Kavin* 1107B.

²⁰⁴ *Marais v Botha* (2008) ZAWCHC 111; *Thomas v Clover* 2002 (3) SA 85 N.

²⁰⁵ *Ex parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T). See ch 4 below for a detailed discussion of unworthiness applicable to fields outside the law of succession.

²⁰⁶ Succession *per stripes* occurs when an heir inherits on the basis of his blood relationship with a predeceased heir of the deceased whose place he fills. In other words, in succession by representation a descendant of a predeceased heir moves up into the place of that predeceased heir.

share will go to the other heir of the deceased according to the rules of intestate succession.²⁰⁷

Under the common law, if a beneficiary is disqualified from inheriting for whatever reason, his descendants are disqualified as well.²⁰⁸ However, this common law position is deemed unfair and was ameliorated by the legislator. Section 2C(2) of the Wills Act 7 of 1953 provides that if a descendant would have been entitled to a benefit had he not been disqualified from inheriting, the descendants of that descendant shall, subject to the provision of section 2C(1), *per stirpes* be entitled to the benefit, unless otherwise indicated by the context of the will.

4 4 Comparative law

According to Australian law, a specific gift given to the killer falls into the residue of the estate.²⁰⁹ If there is no residuary gift or if the killer is the sole residuary legatee, the property is treated as property undisposed of by the will and is distributed as if the testator died intestate.²¹⁰ The killer is also disqualified to inherit intestate.²¹¹ If the gift is to the killer as part of a class of persons, the killer is disregarded and the other members of the class share the disqualified person's share.²¹² The benefit which the killer would have received where intestacy results from his disqualification does not automatically go to the Crown as *bona vacantia*. It goes to those who would have inherited if the killer predeceased the deceased. The killer cannot be represented in intestacy.²¹³

5 Conclusion

In this chapter the established categories of unworthiness is introduced and explained. In the next two chapters the study focusses on the extension of these existing categories of unworthiness within the law of testate and intestate succession, to behaviour other than killing as well as to fields outside of the law of

²⁰⁷ Sonnekus "Verwaarlosing, representasie en onbevoegdheid in die intestate erfreg" 1997 *THRHR* 504 508.

²⁰⁸ Paleker in Jamneck *et al* (eds) 113.

²⁰⁹ *Re Peacock* (1957) Ch 310.

²¹⁰ *Re Pollock* (1941) Ch 219; *Re Gallaway* (1956) Ch 559; *Re Dellow's Will Trusts* (1964) 1 All ER 771; *Re Giles* (1972) Ch 544.

²¹¹ *Re Pollock* (1941) Ch 219; *Re Gallaway* (1956) Ch 559; *Re Dellow's Will Trusts* (1964) 1 All ER 771; *Re Giles* (1972) Ch 544; *Re Cash* (1911) 30 NZLR 577; *Re Tucker*(1920) 21 SR (NSW) 175; *Re Sangal* (1921) VLR 355; *Public Trustee v Fraser* (1987) 9 NSWLR 433.

²¹² *Re Peacock* (1957) Ch 310.

²¹³ *Re Dreger* (1976) 69 DLR 47.

succession. It will be argued that the general principle that no one should be allowed to benefit from his own wrongful act or derive a benefit from conduct that is punishable, is sufficient to include all possible types of wrongful behaviour, and that it is unnecessary to extend the categories of unworthiness to include behaviour that is against public policy.

Chapter 3: Extension of the grounds of unworthiness *within* the law of succession

1 Introduction

The application of unestablished public policy principles to determine the unworthiness of a beneficiary to inherit in the South African law of succession is recently becoming the norm in our courts.²¹⁴ Very little regard is being given to the traditional predominant Roman-Dutch principle that no person may benefit from his own wrongdoing conduct or benefit from conduct which is punishable.²¹⁵ This chapter focuses on the argument of Barns and Thompson²¹⁶ that the oversight stems from a misinterpretation of the influential case of *Taylor v Pim*.²¹⁷ They emphasise that it is not proposed that the application of public policy considerations to cases of disqualifications has led to unjust or prejudicial outcomes, but rather that these outcomes can also be reached if the courts gives true consideration to the applicable Roman-Dutch law principles, which were consistently applied by the courts in the 18th and 19th centuries.²¹⁸ It is suggested that, to subscribe once again to the Roman-Dutch law, will remove the possible ambiguity introduced by public policy considerations and will avoid unexpected outcomes in the future.²¹⁹ Domat²²⁰ argues that:

“The causes which may render the heir unworthy of the succession are *indefinite*, and the discerning of what may or may not be sufficient to produce this effect depends on the quality of the facts and their circumstances. Thus we are not to limit these causes to such as shall be explained in the following articles, where we have only mention of those which are expressly named in the laws. But if there should happen to be any other case where *good manners and equity* should require that an heir should be declared unworthy, it would be just to *deprive him of the inheritance*”. (Emphasis supplied)

When a beneficiary murders the deceased, the exclusion of such a beneficiary is straightforward. However, the extent to which the exclusion applies in circumstances

²¹⁴ De Waal and Zimmermann “The meaning and application of the bloedige hand rule in the Roman-Dutch and modern South African law of succession” in Mostert and De Waal *Essays in Honour of CG van der Merwe* (2011) 169 173.

²¹⁵ De Waal and Zimmermann in Mostert and De Waal *Essays in Honour of CG van der Merwe* (2011) 169 173.

²¹⁶ De Waal and Zimmermann in Mostert and De Waal *Essays in Honour of CG van der Merwe* (2011) 169 173.

²¹⁷ (1903) 24 NLR 484.

²¹⁸ (1903) 24 NLR 484.

²¹⁹ (1903) 24 NLR 484.

²²⁰ *Les Lois Civiles* 2 2550.

in which a person unlawfully brings about the death of another in a way other than murder is contested.²²¹ The grounds of unworthiness are also extended to wrongful conduct *other* than killing.

2 Unworthiness through encouraging of bad and dangerous habits

The case of *Taylor v Pim*²²² is a breakthrough case in our law. It is the leading authority for declaring a beneficiary unworthy due to the encouragement of bad and dangerous habits of the testator. The facts are as follows: The deceased's husband (Edward Bingham) died first, leaving his entire estate to his wife (Rebecca Bingham). Shortly after her husband's death, the deceased moved in with the defendant (Mr Pim).²²³ The deceased started to consume large quantities of liquor, despite her doctor strongly advising against it. It is accepted that the defendant encouraged this behaviour. The deceased executed a will in which she named the defendant as executor and sole heir to her estate. Shortly after executing the will, the deceased suffered a fatal cerebral haemorrhage. At the time of her death, the deceased was heavily intoxicated, and the defendant only allowed for a doctor to be called when the manager of the hotel insisted on doing so. The applicant is the deceased's sister (Taylor). She sought an order declaring the deceased's will void on the grounds that the deceased was not of sound mind at the time of execution of the will; that she was coerced into signing the will; that she was under undue influence from the defendant who also encouraged the bad habits that eventually led to her death and that she was fraudulently influenced by the defendant when executing the will, in that he made promises of a subsequent marriage.²²⁴ The court had to decide whether the defendant should be unworthy to inherit from the deceased's estate.

In his majority judgment, Bale CJ extensively lays down the salient law in this regard before concluding that Pim is unworthy to inherit as thus legally disqualified as a result of his conduct towards the deceased. Bale CJ held that there is no evidence to

²²¹ Wood-Bodley "Forfeiture by a beneficiary who conspires to assault with intent to do grievous bodily harm: *Daniels v de Wet* 2009 (6) SA 42 (C)" 2010 *SALJ* 30.

²²² 1903 24 NLR 484.

²²³ Mrs Bingham was living in adultery with Mr Pim – according Roman Dutch Law, he will consequently be barred from taking any benefit under the will. (See Dig 35 1 72 6; *Pothier ad Pand* 35 1 2 41; Dig 28 5 92 *Wilkinson v Joughin* (1866) L R 2 B; *Boddington In Re* (1883) 22 Ch D 685; Voet 35 1 9 Code 6 24 4 4; *Brunemann ad loc*; *Perezus ad loc*; Dig 34 9 4; Voet 34 9 6; Voet 28 5 6 and 34 9 3; Huber *Praelectiones juris civilis* 4 9 4; Code 5 5 4).

²²⁴ *Taylor v Pim* 486.

prove that the deceased lacks testamentary capacity at the time of executing the will or to prove that the deceased was unduly influenced by the defendant.²²⁵ The defendant is unworthy to inherit from the deceased, because he is the cause of the deceased's "fall from a virtuous and honourable life to a degraded and immoral one".²²⁶

Barns and Thompson²²⁷ identify three possible reasons considered by Bale J for disqualifying Pim: In the first place, they consider the Roman-Dutch overarching principle that no one is allowed to benefit from his own wrongful conduct, or benefit from conduct that is punishable.²²⁸ This principle entails that a beneficiary must cause himself to be enriched through his wrongful conduct. For the disqualification to take effect there must be a causal connection between the damage and the enrichment.²²⁹ In the second place, the specific classes of persons cited by the Roman-Dutch writers which are still relevant to this day. The two relevant classes for the purpose of this particular case are the rule that an adulterer cannot appoint an

²²⁵ According to the English law, the mere fact that a person is a habitual drunkard is not in itself sufficient to annul the will, provided that the testator was not under the excitement of liquor at the time of making the will. (See "William's Law of Executors" 1 39.) In the case of *Wingrove v Wingrove* (11 PD 81) it was held that, to establish undue influence, it must be shown that the will of the testator was coerced into doing that which he did not desire to do, and the mere fact that in making this will he was influenced by immoral considerations does not amount to such undue influence so long as the dispositions of the will express the wishes of the testator. The case of *Boyce v Rossborough and Wife* (1856 6 HLC 2), which was determined by the House of Lords in Appeal, may be very useful referred to in this connection, as illustrating the rule. In the course of his judgment the Lord Chancellor said: "The difficulty of deciding such a question arises from the difficulty of defining with distinctness what is undue influence. In a popular sense, we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a friend of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps ever creditable: the friend is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by his regard for the friend who had thus led him astray, were to make a will and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered, merely because the friend had urged, or even importuned, the young man were really carrying into effect his own intention, formed without either coercion or fraud...In order therefore to have something to guide us in our enquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or fraud...It is sufficient to say, that allowing a fair latitude of construction, they must range themselves under one or other of these heads. One point, however, is beyond dispute, and that is, that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed." (See Jurist N s 3 373 and Kerr on Fraud and Mistake (2) 298).

²²⁶ *Taylor v Pim* 495.

²²⁷ "Reconsidering the indignus principle in the South African law of succession" in De Waal and Paleker *South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 125.

²²⁸ Van Leeuwen *Censura Forensis* 3 3 9; Code 6 33; Voet *Commentarius ad Pandectas* 34 9 6.

²²⁹ *Ex parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T) 753A-G; *Nell v Nell* 1976 (3) SA 700 (T) 704H-705A.

adulterous beneficiary and heirs who neglect a beneficiary to such a degree that it leads to his death through their own negligence and fault.²³⁰ In the third place, Bale CJ also cites the Domat Gloss.²³¹

Barns and Thompson²³² note that Bale CJ does not explicitly identify which one of the grounds are specifically relied upon in coming to his conclusion. They argue that the first and second categories mentioned above should be favoured over Domat's Gloss for the following reasons: If the majority judgment of Bale CJ is read with the separate judgements of Finnemore J and Beaumont J, it becomes clear that all of the judges primarily rely on the specific Roman-Dutch authorities.²³³ Finnemore J states that the unworthiness must be based on ultimately causing the testatrix's death and also for his adulterous relationship with the testatrix.²³⁴ This is respectively the first and second of the aforementioned Roman-Dutch categories.²³⁵ In his separate judgment, Beaumont J explains that the defendant is unworthy on the ground that he caused the death of the deceased, and subsequently benefited from this conduct.²³⁶ Barns and Thompson²³⁷ note that this is the first of the aforementioned Roman-Dutch categories. They make the conclusion that the correct

²³⁰ *Taylor v Pim* 491-492. See respectively Voet 5 28 6 and Digest 34 9 3. See also *Ex parte Steenkamp and Steenkamp* 1952 749F-H. It must be kept in mind that these are old Roman-Dutch grounds for unworthiness. The rule that an adulterer cannot appoint an adulterous beneficiary is no longer applicable in our law.

²³¹ See par [1] above.

²³² "Reconsidering the indignus principle in the South African law of succession " in De Waal and Paleker *South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 126.

²³³ Barns and Thompson in De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 126.

²³⁴ *Taylor v Pim* 495.

²³⁵ Barns and Thompson in De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 126.

²³⁶ *Taylor v Pim* 497. It is insightful to mention the *obiter dictum* of Beaumont J, where he said that it seems as if this case were decided according to English Law the plaintiff would not be entitled to succeed. It has not been shown by evidence that the testatrix was of unsound mind or that she acted in fraud or from any fraudulent misrepresentation, or that she acted under any coercion which would disentitle the defendant to succeed. With regard to the question of illicit intercourse it is true that our law lays down the bald statement that neither an adulterer nor an adulteress may inherit from each other, but I wish to point out that that rule is dependent upon the fact that at that time adultery was regarded and punished as a criminal offence. But however that may be, it seems to me that under our own law there is sufficient authority to justify us in disentitling the defendant as an unworthy person from inheriting under this will. It is quite clear that under the circumstances of this case we are justified in coming to the conclusion that the defendant was the person who induced the testatrix to take to habits of intemperance, and that he encouraged her with a view to ultimately bringing about her death and of benefiting himself. Beaumont J states that, therefore, under our law we can hold that he is disentitled on the ground that he encompassed the death of the testatrix with a view of benefiting himself by her death. His action in this matter was certainly most reprehensible. (See 498).

²³⁷ De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 126.

ratio decidendi that should be taken from both the majority and separate judgments is the principle that no person is allowed to benefit from his own wrongful conduct – the first of the aforementioned Roman-Dutch categories.²³⁸

3 Should the common law grounds of unworthiness be extended to include public policy?

In *Ex parte Steenkamp and Steenkamp*²³⁹ Steyn J expresses doubt as to whether it is permissible to extend the grounds of unworthiness,²⁴⁰ even though he had been referred to Bale CJ's judgement in *Taylor v Pim*²⁴¹ and to the passage from Domat²⁴² in which he declares that the causes of unworthiness are undetermined, and it shouldn't be limited to the expressed categories of unworthiness. The grounds of unworthiness must therefore be extended in accordance with the prescriptions of decency and fairness. However, it seems as though Bale CJ only refers to Domat as part of the *obiter dictum*, and Steyn J is not willing to accept it as authority for the permissibility of extending the categories of those who are unworthy to inherit.²⁴³ Referring to two texts in the Digest,²⁴⁴ Steyn points out that in Roman law the murderer does not necessarily forfeit the inheritance under circumstances where the murderer does not stand to benefit directly from the estate of the victim, but from the estate of a third person who inherits from the victim. The same is also true for Roman-Dutch law.²⁴⁵ However, when a particularly close relationship exists between the victim and the deceased, an exception is recognised. Under these circumstances the murderer cannot inherit from the deceased.²⁴⁶ Steyn J also interprets the authority of Roman-Dutch writer Matthaeus²⁴⁷ when he says that, since forfeited benefits no longer go to the state, it is now permissible to extend the

²³⁸ De Waal and Zimmermann in De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 126.

²³⁹ See ch 2 par 3 2 2 for the facts of this case.

²⁴⁰ *Ex parte Steenkamp and Steenkamp* 751H.

²⁴¹ (1903) 24 NLR 484.

²⁴² *Ex parte Steenkamp and Steenkamp* 750G.

²⁴³ *Ex parte Steenkamp and Steenkamp* 751A.

Barns and Thompson 127 also noted that the court clearly thought that Domat's Gloss was not decisive of the outcome in *Taylor v Pim* (1903) 24 NLR 484.

²⁴⁴ 34 9 5 7 and 34 9 7.

²⁴⁵ Voet 34 9 1.

²⁴⁶ De Waal and Zimmermann in De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 173 175.

²⁴⁷ *Zinspreuken* 132 138. Matthaeus specifically mentioned certain persons that will fall under the *coniunctissimi* of the testator – including the victim's spouse, father and son, but not brothers.

categories of unworthiness to situations involving equally serious harm.²⁴⁸ Steyn J questions the accuracy of this view. He argues that the enlargement of the coffers of the state is not the only objection to extending the categories of unworthiness.²⁴⁹ Steyn J indicates that the fact remains that pronouncing a person to be unworthy involves a taking away, and consequently any extension of the categories of unworthiness will be unjust and odious.²⁵⁰ He specifies that for this reason, other older authorities are hesitant to permit extension of the grounds for unworthiness even on the basis of analogous situations.²⁵¹ Steyn J also believes that extending the grounds of unworthiness is conflicting to the general rule of testate succession, namely that anyone can inherit unless it is expressly prohibited for the person to do so.²⁵² Steyn J is fortified in his view that the grounds should not be extended, by a case mentioned by the German jurist Leyser in which a beneficiary who was guilty of incest during his wife's lifetime, and of unlawful sexual relations after her death, was allowed, against the desires of the deceased's heirs, to take a benefit promised to him in the marriage contract and confirmed in the will.²⁵³ The court held that he is not unworthy, and does not forfeit his rights, because there is no law that specifies unworthiness in such a situation.²⁵⁴

4 Unworthiness through concealing or destroying a will

In the case of *Yassen v Yassen*²⁵⁵ the capacity of a beneficiary who had allegedly concealed or destroyed the testator's will to inherit from the testator is discussed. Harcourt J addresses two issues: In the first place, whether the deceased, Mahomed Yassen, left a valid will and in the second place, whether a document professing to be his will was in fact fraudulently drafted by his son, Ahmed Yassen, the defendant.²⁵⁶ An application was brought to declare the first defendant, a son of the testator of a will which had been accepted by the Master as the last will of the testator, unworthy to inherit under such will or to hold the office of executor on the ground, amongst others, that he had either concealed or destroyed a subsequent

²⁴⁸ *Ex parte Steenkamp and Steenkamp* 751A-B.

²⁴⁹ 751B.

²⁵⁰ 751C-D.

²⁵¹ 751D.

²⁵² 751E-F.

²⁵³ 751G-H.

²⁵⁴ 751G-H.

²⁵⁵ 1965 (1) SA 438 (N).

²⁵⁶ *Yassen v Yassen* 439.

will, even though the plaintiffs were unable to prove that the second will was a valid one, or even that the son thought that it was a valid will.²⁵⁷ In reaching a decision, Harcourt J refers to Voet:

“Legatee hiding will. – For a like reason if a legatee has hidden the last will, and it has afterwards come out into the light, the legacy of which he has rendered himself unworthy by his fraud stays in the hands of the heir whom he had meant to defraud of his inheritance.”²⁵⁸

Harcourt J held that there is insufficient evidence for the plaintiff’s allegations and the defendant is subsequently not unworthy to inherit.²⁵⁹ He also refers to the passage by Domat in the treating of persons who are unworthy to inherit or of being executors, expressing a reluctance to rely solely on Domat’s Gloss:²⁶⁰

Harcourt J held that using the principles of equity and good manners as a test for unworthiness is not reliable to be a test of general application.²⁶¹ He observes that there are numerous actions that may be viewed as contrary to good manners, but which can never be a sufficient cause for declaring an heir as unworthy.²⁶² Barns and Thompson²⁶³ submit that this risk of “opening the legal floodgates” to unauthentic claims is yet another reason to suggest that sole reliance on Domat’s Gloss should be approached cautiously. Although Harcourt J did not have to decide on the unworthiness of a person who concealed the testator’s will, the *obiter* remarks regarding this issue is relevant. It seems as though Harcourt J accepts that a person who conceals a testator’s will is unworthy to inherit from the testator, provided the document that is concealed is indeed a will.²⁶⁴

5 Unworthiness through forgery of a will

The case of *Pillay v Nagan*²⁶⁵ is the first case that deals with the unworthiness of a person who forged a will. The respondent (Nagan) forged his mother’s signature on a document purporting to be her will and at the same time, procured the transfer of

²⁵⁷ *Yassen v Yassen* 438D.

²⁵⁸ Voet 34 9 2.

²⁵⁹ *Yassen v Yassen* 438E.

²⁶⁰ 441C-D. See par [1] above for Domat’s Gloss.

²⁶¹ 441.

²⁶² 441.

²⁶³ De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 127.

²⁶⁴ *Yassen v Yassen* 440H.

²⁶⁵ 2001 (1) SA 410 (D).

a major asset in the estate, a house, into his own name on the strength of the will which he had forged. He then tried to pass it off to his siblings as his mother's last will and testament.²⁶⁶ At some point after this, he conferred to family members (the plaintiffs) about the forgery. In an action for the setting aside of the transfer of the house, after the first defendant had confessed to his misconduct, the question arose whether the first defendant was unworthy to take the benefits of an intestate heir by virtue of his fraudulent act by which he had sought to deprive his brothers and sisters of their rightful inheritances. The plaintiffs sought an order to disqualify the respondent from inheriting from his mother on the ground of forgery.

McCall J indicates that the South African law is silent on the issue of whether a person that forges the deceased's will is disqualified to inherit from him.²⁶⁷ He refers to Domat's Gloss as well as to the Roman-Dutch principle rule that a person who hides a testator's last will is unworthy to inherit.²⁶⁸ Relying solely on Domat's Gloss, McCall J extends this rule of unworthiness to include persons who forge a will in order to exclude other rightful heirs.²⁶⁹ He justifies this extension by relying on Domat's Gloss and reasoning that public policy requires an extension of the abovementioned rule and the subsequent disqualification of such unworthy persons.²⁷⁰ McCall J refers to the fact that falsifying a document purporting to be a will is a crime²⁷¹ under section 102(1) of the Administration of Estates Act 66 of 1965. Barns and Thompson²⁷² argue that if one were to recall the Roman-Dutch

²⁶⁶ *Pillay v Nagan* 411C-H 423F-G.

²⁶⁷ In this regard, it is interesting to look at the position in the English law, specifically the case of Thomas Griffiths Wainewright (See Peach "Wainewright, Thomas Griffiths (1794-1847) *Oxford Dictionary of National Biography* (2004) in <http://www.oxfordnb.com/view/article/28403> (19 May 2006); Wilde "Pen, pencil and poison: A study in green" (originally) 1889 (Jan) *Fortnightly Review*, 1984 (Dec) *Art & Antiques* 81, <http://gaslight.mtroyal.ab.ca/pppgreen.htm> (12 June 2005); Motion *Wainewright the Poisoner: The Confessions of Thomas Griffiths Wainewright* (2000); Groom *The Forger's Shadow: How Forgery Changed the Course of Literature* (2002)). This case predominantly concerns murder committed for insurance benefits, but it is also significant authority with regard to the act of forging a will. The facts are briefly as follows: Wainewright's grandfather left him a sum of money in trust. Wainewright then forged the signatures of his trustees and also convinced the Bank on England to pay him a moiety of the capital sum in the trust. At that time, forgery in the Bank of England carried the death sentence (See Groom *The Forger's Shadow: How Forgery Changed the Course of Literature* 2002). Although Wainewright was suspected of killing his grandfather and accused of insurance fraud, it was the forgery perpetrated on the Bank of England that finally brought him to book.

²⁶⁸ *Pillay v Nagan* 424.

²⁶⁹ *Pillay v Nagan* 425.

²⁷⁰ *Pillay v Nagan* 425.

²⁷¹ *Pillay v Nagan* 425-426.

²⁷² De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 129.

principle that no person is allowed to benefit from his own wrongful conduct or conduct that is punishable by law, it becomes apparent that referral to Domat's Gloss is in fact unnecessary. The primary Roman-Dutch principle could have been applied to the situation, thereby holding the defendant legally unworthy to inherit. This approach would have led to the same conclusion and it would have been in accordance with the existing Roman-Dutch common law and the principles of current judicial precedent.²⁷³ In making his decision, McCall J refers to the judicial precedent set in the *Taylor*-case, as well as to Voet,²⁷⁴ who says that if a legatee hides a will, then he will be disqualified and his inheritance will go to the heir that he sought to defraud. He briefly refers to the doubts expressed in the *Steenkamp*-case to whether the categories of unworthiness can be extended,²⁷⁵ but he is clearly not convinced by the arguments advanced there. McCall J held that public policy requires that the grounds of unworthiness must be extended by analogy to render unworthy a person who, by the fraudulent act of forging a will, seeks to deprive his co-heir on intestacy of his rightful inheritance.²⁷⁶ He further expresses the view that the fraudster's share on intestacy ought to accrue to his brothers and sisters.²⁷⁷ Wood-Bodley²⁷⁸ argues that this approach in the *Pillay*-case in terms of which a gradual development of the forfeiture rules is permissible, is to be preferred because a degree of flexibility in the categories of unworthiness is desirable and the approach in the *Steenkamp*-case will fossilize and stultify the law.

6 Unworthiness of a beneficiary who conspires to assault with intent to do grievous bodily harm

In *Danielz NO v De Wet*²⁷⁹ the late Mr de Wet (hereinafter 'the deceased') had a disagreement with Mrs de Wet (his wife). Mrs de Wet resolved to "teach the deceased a lesson".²⁸⁰ She then engaged the services of one Benting. She paid him to assault the deceased and it was her intention that the deceased should be

²⁷³ Barns and Thompson in De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 129.

²⁷⁴ 34 9 2.

²⁷⁵ *Pillay v Nagan* 424E.

²⁷⁶ 424H-425B.

²⁷⁷ 424I-J.

²⁷⁸ 2010 SALJ 30 34.

²⁷⁹ 2008 (4) All SA 549 (C).

²⁸⁰ *Danielz NO v De Wet* 2008 (4) All SA 549 (C) par [23].

assaulted “so severely that he would be confined to a wheelchair”²⁸¹ To this end, Mrs de Wet arranged for the live-in domestic to be out and she left the front door of their house open.²⁸² On that night, at least one person entered the house and shot the deceased eighteen times. The deceased died from his wounds.²⁸³ Mrs de Wet was convicted of assault with the intent to do grievous bodily harm as well as of conspiracy to so assault the deceased.²⁸⁴ The criminal court held that it is not proved beyond reasonable doubt that Mrs de Wet intended to kill the deceased or reasonably foresaw that he would die. In the civil proceedings it is accepted that the deceased died as a result of the assault.²⁸⁵ Traverso AJP had to decide on three issues: In the first place, whether Mrs de Wet is entitled to benefit directly from the proceeds of the policies over the life of the deceased in terms of which she is the sole nominated beneficiary;²⁸⁶ secondly, whether Mrs de Wet can benefit indirectly as the co-owner of the joint estate if the policies are to be paid into the joint estate²⁸⁷ and whether she can benefit indirectly by way in inheritance in terms of the deceased’s will if the proceeds of the policies form part of the deceased’s estate.²⁸⁸ Traverso AJP held that public policy will prevent Mrs de Wet to take any benefit under the will. This is because a beneficiary who is guilty of intentional and unlawful acts or threats of violence that leads to death is not allowed to inherit from the person whose death he causes, even if the killing is unintended.²⁸⁹ Traverso AJP does not rely on any specific ground of unworthiness to inherit. She also does not find it necessary to rely on either intentional or negligent killing. She held that

“The grounds are not static and the *common law should be developed* to include those grounds that presently offend the *boni more* of society”.²⁹⁰ (Emphasis supplied)

Although *obiter*, she reinvigorates the view applied by Bale CJ in *Taylor v Pim*²⁹¹ when using Domat’s Gloss as authority to create an overarching principle grounded

²⁸¹ par [24].

²⁸² par [23].

²⁸³ par [23].

²⁸⁴ par [10].

²⁸⁵ par [21].

²⁸⁶ par [13]. See ch 4 for a discussion of this legal question.

²⁸⁷ par [13].

²⁸⁸ par [13].

²⁸⁹ par [36].

²⁹⁰ par [38].

²⁹¹ 1903 24 NLR 484.

in public policy. She relies on Domat in holding that new grounds for disqualification should be developed where public policy requires this in order to disqualify such a clearly unworthy spouse. In reaching a decision, Traverso AJP quotes the judge in the English case of *Hardy v Motor Insurer's Bureau*²⁹² when he says:

“The logical test, in my judgment, is whether the person seeking the indemnity was guilty of *deliberate, intentional and lawful violence or threats of violence*. If he was, and death resulted therefrom, then, however unintended the final death of the victim may have been, the court should not entertain a claim for indemnity.”²⁹³ (Emphasis supplied)

She also quotes Salmon LJ in the case of *Gray v Barr*²⁹⁴ when he concludes:²⁹⁵

“I am confident that in any civilised society, *public policy* requires that anyone who inflicts injuries in the course of such an act shall not be allowed to use the courts of justice for the purpose of enforcing any contract of indemnity in respect of his liability in damages for causing injury by accident.” (Emphasis supplied)

Wood-Bodley²⁹⁶ refers to the judgment in the *Steenkamp*-case where Steyn J voices the opinion that courts should not be permissible to extend the existing grounds of unworthiness.²⁹⁷ Although Traverso AJP is not bound by this opinion, Wood-Bodley says that it is unfortunate that she doesn't at least consider this argument. Wood-Bodley²⁹⁸ questions whether a radical departure from the *status quo* envisaged by Traverso AJP is wise and justified. He argues that it will be better if changes are incremental and limited to circumstances analogous to existing grounds of unworthiness. It is not necessary to extend the existing grounds in order to exclude Mrs de Wet from benefiting, because the existing principle is that a person who unlawfully causes the death of a deceased is unworthy to inherit from the deceased. This does not call for a beneficiary to be guilty of a specific crime. Mrs de Wet was a party to an assault that led to the death of the deceased. It is doubtful whether an extension of the recognised categories of unworthiness, much less a wholesale abandoning of the traditional categories in favour of a predominant principle based

²⁹² 1964 2 All ER 742.

²⁹³ *Hardy v Motor Insurer's Bureau* par [31].

²⁹⁴ 1971 2 All ER 949 (CA).

²⁹⁵ *Gray v Barr* 1971 2 All ER 949 (CA) 965D.

²⁹⁶ 2010 SALJ 30 33.

²⁹⁷ *Ex parte Steenkamp and Steenkamp* 751H.

²⁹⁸ 2010 SALJ 30 34.

on unrestricted public policy, is necessary. Barns and Thompson²⁹⁹ also contend that such an approach is unnecessary and introduces doubt into the law. They argue that a simple application of the Roman-Dutch principle – that no one is allowed to benefit from his own wrongful act – would have been sufficient to exclude Mrs de Wet from taking any benefit, since it is clear that she caused the death of the deceased. They emphasise that the outcome will be the same, but the principles of precedent will be served better. However, Wood-Bodley³⁰⁰ indicates that the flexibility inherent in the common law treatment of unworthiness is necessary, and overshadows the disadvantage of the reservation that exists regarding the exact circumstances in which a person is unworthy at common law.³⁰¹ The flexibility will be absent, and the law impoverished, if the rules are not codified or recorded in statutory form for the benefit of greater certainty.³⁰² The *Danielz*-case offers support to the argument that all unlawful killing results in forfeiture because the case is decided on the basis that Mrs de Wet did not intend to kill her husband.³⁰³ Wood-Bodley specifies that, in so far this decision is based on unworthiness rather than on unjustified enrichment principles, the judgement functions on the basis of an extensive criterion of public policy, and avoids reliance on the specific categories of unworthiness recognised by the old authorities.³⁰⁴ As he indicates in his discussion of the *Steenkamp*-case and the case of the *Pillay*-case,³⁰⁵ the propriety of extending the forfeiture rules outside those grounds recognised by the old authorities is disputed in the *Steenkamp*-case, although in the *Pillay*-case, McCall J is of the opinion that the grounds recognised by the old authorities can be extended to cover analogous situations.³⁰⁶ Wood-Bodley maintains that the *Danielz*-case signifies a major departure from both these approaches in grounding its finding of unworthiness directly on the principle of public policy rather than applying or developing one of the grounds for unworthiness

²⁹⁹ De Waal and Paleker *South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 130.

³⁰⁰ 2010 SALJ 30 36.

³⁰¹ 2010 SALJ 30 36.

³⁰² Wood-Bodley 2010 SALJ 30 36.

³⁰³ Wood-Bodley 2010 SALJ 30 36.

³⁰⁴ Wood-Bodley 2010 SALJ 30 37.

³⁰⁵ See paragraph 4 3 below for a detailed discussion of this case.

³⁰⁶ *Pillay v Nagan* 2001 (1) SA 410 (D).

acknowledged by the old authorities. He notes that, in this respect, the decision is on “shaky ground”.³⁰⁷

7 Unworthiness through reprehensible behaviour towards the deceased

In *Mabika v Mabika*³⁰⁸ the deceased was married in community of property to the first respondent. The deceased bought property shortly before her death and paid all of the instalments herself.³⁰⁹ The applicants were the children and grandchild of the deceased. Although the deceased and first respondent was still married at the time of her death, their marriage has broken down.³¹⁰ They never instituted divorce actions, because the first respondent threatened to take the deceased life if she divorced him, and were estranged for some years prior to the deceased’s death.³¹¹ Evidence before the court stated that the reason for the breakdown of the marriage was mainly due to the first respondent’s violent behaviour towards the deceased.³¹² In 2007 the deceased was hospitalised as a result of the first respondent’s continuous assaults on her, and also because of depression and a brain tumour.³¹³ The first respondent did not visit the deceased, and he expressed a wish for her death.³¹⁴ In 2010 the deceased was hospitalised again, and the first respondent showed no interest or concern for her.³¹⁵ In September of 2010 the deceased contacted a financial planner and gave instructions for the drafting of a will.³¹⁶ This application for the drafting of a will contained various items and documents of information and was signed by the deceased. In her own handwriting, she added the following clause to the application:

“If I pass away my child Miss Sindiswe Mabika will arrange for my burial, I want the children to own the property and not to be sold as a family property. The other policies and Investments to be shared equally 25% each.”³¹⁷

³⁰⁷ *Pillay v Nagan* 2001 (1) SA 410 (D).

³⁰⁸ (2011) ZAGPJHC 109.

³⁰⁹ *Mabika v Mabika* par [7 2].

³¹⁰ *Mabika v Mabika* par [9].

³¹¹ *Mabika v Mabika* par [7 3].

³¹² *Mabika v Mabika* par [7 3].

³¹³ *Mabika v Mabika* par [7 4].

³¹⁴ *Mabika v Mabika* par [7 5].

³¹⁵ *Mabika v Mabika* par [7 5].

³¹⁶ *Mabika v Mabika* par [11].

³¹⁷ *Mabika v Mabika* par [11].

The deceased died without properly executing a will. The applicants succeeded in an application for the condonation of the application for the drafting of a will in terms of section 2(3)³¹⁸ of the Wills Act 7 of 1953.³¹⁹ If the order didn't succeed, the first respondent would have been an intestate heir in the deceased's estate.³²⁰

Wood-Bodley³²¹ argues that the legal basis on which the application is granted is unsatisfactory. He states that it is clear that the first respondent is not a deserving beneficiary, and that it is also clear that the deceased did not want to or intended to let him benefit. The main factor that must be proven in order to succeed in a section 2(3) application is that the deceased intended the document to be his will.³²² Wood-Bodley³²³ explains that, if evidence proved that the deceased had intended instructions to serve as an interim will proceeding the execution of a final document, then the intention requirement of section 2(3) will be satisfied because the deceased would have had *animus testandi* in regarding the document. Moshidi J substantiates his decision to grant a section 2(3) application by stating that:³²⁴

"It is plain that the deceased died...engulfed in miserable circumstances after she executed, in her own handwriting Annexure "SM2" [the Application For the Drafting of a Will]. She clearly *intended* the document to be her final will but did not survive to sign it. This is so despite the fact that the document is styled "Application For the Drafting of a Will". It contained full personal details which the deceased intended to appear in her will. The surrounding circumstances are that the *deceased and the first respondent, due to his cruelty towards her, were estranged*. They were on the verge of a divorce, but for her illness and eventual death. They no longer lived together since 2006. The deceased clearly *intended to disinherit* the irresponsible and unemployed first respondent from her estate. She took him to the

³¹⁸ This section provides that "If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purpose of the Administration of Estates act 66 of 1965, as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1)".

³¹⁹ *Mabika v Mabika* par [19].

³²⁰ According to s1(1)(c)(i) of the Intestate Succession Act 81 of 1987.

³²¹ "Can section 2(3) of the Wills Act 7 of 1953 properly be applied to a mere instruction to draft a will? *Mabika v Mabika*" 2013 SALJ 244 246.

³²² In *Ex parte Maurice* 1995 (2) SA 713 (C) 716E-F Selikowitz J refused a s2(3) application: "In my view, s2(3) requires that the document in question must have been intended by the testator to be his/her will. A document which was intended to convey information about what a testator wishes to have included or has already included in his/her will does not suffice. Written instructions to an attorney or other adviser so as to enable the recipient to draft the testator's will are not intended by such testator to constitute his/her will albeit that they record the authors' intended testamentary dispositions."

³²³ 2013 SALJ 244 246.

³²⁴ *Mabika v Mabika* par [15].

maintenance court in order to compel him to comply with his fatherly responsibilities...She even obtained an interim protection order to put an end to the *persistent assaults* on her. She was also hugely scared of the first respondent. That is why she never ventured to mention to him the word “divorce”. Under these circumstances, it will be *greatly unjust* not to accept [the document] as the deceased’s final will, and the first respondent will *unfairly benefit* from her estate when it is clear that such was *not her intention*.” (Emphasis supplied)

Wood-Bodley states that this judgment is ambiguous.³²⁵ He says that it is clear from the subsequent comments that the decision of Moshidi J to grant a section 2(3) order is based on the deceased’s general intention not to benefit the first respondent. This intention is based on the bad circumstances of the marriage and the steps that she had set into motion towards making a will and the injustice and unfairness that will result if the first respondent is to inherit from her.³²⁶ Wood-Bodley³²⁷ states that none of the abovementioned factors form part of the criteria of section 2(3). This section does also not confer any discretion on a court whether or not to condone a document to be accepted as a valid will if the requirements of section 2(3) are present.³²⁸ Wood-Bodley³²⁹ further explains that if the provisions of the section are not satisfied the court has no power to intervene, even when it believes that it would be just and consonant with the deceased’s wishes to do so. This point is clearly made in the *Williams*-case where it is stated:³³⁰

“The interference is inescapable that the Legislature by promulgating section 2(3) intended to ameliorate very real cases of injustice due to strict compliance with formalities...and to reaffirm the sanctity of the testator’s last wishes. A court will, of course, bear in mind that the Legislature has stated requirements within the framework of which this purpose is to be served and has not stated a general principle which the Courts can apply at will or on a discretionary basis”.

Wood-Bodley³³¹ admits that it is understandable that Moshidi J wish to give effect to the wishes of the deceased for the first respondent not to inherit from her, but he fails

³²⁵ 2013 SALJ 244 257.

³²⁶ Wood-Bodley 2013 SALJ 244 257-258.

³²⁷ 2013 SALJ 244 258.

³²⁸ *Anderson and Wagner NNO v The Master* 1996 (3) SA 779 (C) 785E-F; *Ex parte Williams: In re Williams Estate* 2000 (4) SA 168 (T) 172B-D.

³²⁹ 2013 SALJ 244 258.

³³⁰ *Ex parte Williams: In re Williams Estate* 2000 (4) SA 168 (T) 172B-D.

³³¹ 2013 SALJ 244 259.

to give effect to section 2(3).³³² He concludes that a section 2(3) application ought to have been refused.³³³ The facts that the deceased decided to exclude the first respondent from her will, and that the evidence is that he abused her and did not look out for the best interest of his children does not provide a legal bases for the application of a section 2(3) order in terms of either of the forms completed by the deceased.³³⁴ Evidence in court shows that the first respondent's behaviour towards the deceased was callous and shocking, but it still does not justify an order in terms of section 2(3).³³⁵ Wood-Bodley indicates that a section 2(3) order is not the only option to prevent the first respondent from benefiting from the estate of the deceased. The case could have been decided by applying the general unworthiness principle as a result of his degrading and wrongful treatment of the deceased.³³⁶

8 Evaluation and conclusion

Barns and Thompson³³⁷ maintain that the court in *Taylor v Pim*³³⁸ correctly held that the Roman-Dutch maxim that no person may benefit from his own wrongdoing should still be the predominant principle governing common law disqualification from benefits in the South Africa law of succession. Although the court mentions it in its reasoning, Domat's Gloss does not influence the reasoning and decision.

Barns and Thompson³³⁹ indicate that, unfortunately, subsequent cases misinterpret the core of the court's reasoning in *Taylor v Pim*,³⁴⁰ resulting in overemphasising Domat's Gloss. In addition to Domat's Gloss never been effectively acknowledged into our common law, the test suggested by Domat is dangerously ambiguous and can lead to unjust results. Admittedly the test provides the advantage of flexibility in

³³² The law requires that a deceased's testamentary intentions must be expressed in a testamentary document in order to be legally relevant (see *Wessels v Die Meester van die Hooggeregshof Bloemfontein* (2007) ZASCA 17 par [13]). Such a document is one that complies with the formalities for making a will set out in s2 of the Wills Act 7 of 1953, or that satisfies the peremptory requirements that would enable a court to make an order in terms of s2(3). Wood-Bodley is of the opinion that neither such document existed on the facts of the *Mabika*-case (See Wood-Bodley "Can section 2(3) of the Wills Act 7 of 1953 properly be applied to a mere instruction to draft a will? *Mabika v Mabika*" 2013 SALJ 244 259).

³³³ Wood-Bodley 2013 SALJ 244 259.

³³⁴ Wood-Bodley 2013 SALJ 244 260.

³³⁵ Wood-Bodley 2013 SALJ 244 260.

³³⁶ Wood-Bodley 2013 SALJ 244 260.

³³⁷ De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 130.

³³⁸ *Taylor v Pim* (1903) 24 NLR 484.

³³⁹ De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 130.

³⁴⁰ *Taylor v Pim* (1903) 24 NLR 484.

the law, but an argument for its application will have to be a well-reasoned in order to compensate for the inherent risks and the rules of judicial precedent. The cases subsequent to the *Taylor*-case that rely on Domat fail to offer such an argument.

Barns and Thompson³⁴¹ use hypothetical examples to illustrate how the courts' application of Domat's Gloss can lead to unwanted outcomes and consequently unsatisfactory judicial precedents on our law. They used the example of a son who physically abused his father for a number of years. When the son was 18 years old, the father passed away for reasons unrelated to the physical abuse. On the day before his death, the father executed a valid will, nominating his son as his sole heir. Despite the abuse, it is clear that the father still wanted for his son to inherit his estate. The other children of the deceased applied to court to disqualify their sibling on the ground that he is unworthy to inherit from his father. If the court is to apply Domat's Gloss, these applicants will possibly succeed in their court challenge. This is an odd outcome, because it is clear that the father wanted the son to inherit through a validly executed will, despite the abuse. However if the courts apply the Roman-Dutch approach, the applicants will not succeed, since they will not be able to prove that the son's behaviour is the cause of his enrichment. The standard required by the original Roman-Dutch principle outlined above will not be met under these circumstances.³⁴² Another example used by Barns and Thompson is that of a family consisting of a wealthy husband Douglas, his second wife Thembi and Douglas' two children born from a previous marriage. During their marriage, Thembi was a loving wife and stepmother. After Douglas's death, his will states that his estate must be divided between his two children, Thembi and his previous wife. Shortly after her husband's death, Thembi discovers evidence of an apparent love affair between Douglas and another woman. She approaches a tabloid newspaper with this information. Thembi makes certain statements about her husband in the newspaper, which would have been of a defamatory nature had he still been alive. The other beneficiaries approach the court to have her disqualified based on the

³⁴¹ De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 130-131.

³⁴² Barns and Thompson also mentioned that, although the question of the nature of causation required, namely factual and legal causation, is beyond the scope of their article, the requirements of a causal link between the wrongdoing and the enrichment is without doubt and integral part of the Roman-Dutch formulation. See *Ex Parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T) 753A-G; *Nell v Nell* 1976 (3) SA 700 (T) 704H-705H.

ground of her unworthiness. They argue that the family's reputation is ruined by these statements and the memory of Douglas is destroyed. According to Domat's Gloss, it is possible for this application to succeed and for Thembi to consequently be found unworthy to inherit from the deceased. However, if the court is to consider the original Roman-Dutch principle outlined above, it will have to be concluded that Thembi is not unworthy to inherit. Although it is true that Thembi's actions after her husband's death were not becoming of a loving wife; they were in no way the cause of her enrichment. The enrichment is justifiable because it is a consequence of her dutiful commitment to Douglas and his two children during his lifetime. These examples highlight the tension that Domat's Gloss causes between the broader society's views of what equity and good manners require and the testator's true intentions, and freedom to bequeath his private property to whomever he deems fit, regardless of the beneficiaries' unworthiness in the eyes of the wider public.

The Supreme Court of Appeal does not support a reliance on public policy and general notions of equity and good manners to determine legal rights. This is illustrated in the recent case of *Potgieter v Potgieter*.³⁴³ Although the facts of this particular case are not relevant to the current discussion, the *obiter dicta* of Brand JA are worth mentioning:

"[T]he reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as *reasonable and fair*, is essentially that it will give rise to *intolerable legal uncertainty*. That much has been illustrated by past experience. *Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. Or, as Van den Heever JA put it in Preller and Others v Jordaan 1956 (1) SA 483 (A) at 500, if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge.*"³⁴⁴ (Emphasis supplied)

In the case of *Du Plessis v Strauss*³⁴⁵ the separate judgment of Corbett JA is significant regarding the hierarchy of sources of South African law:

"To the extent that the law and practice of other countries having cognate legal systems, such as, for example, Friesland, France and the principalities of Germany, may have differed from that in Holland, preference must be given to the latter since Holland is from where our

³⁴³ 2012 (1) SA 637 (SCA).

³⁴⁴ *Potgieter v Potgieter* 2012 (1) SA 637 (SCA) par [34].

³⁴⁵ 1988 (2) SA 105 (A).

common law derives. *This rules out reliance upon the views of such authorities as Huber, Sandé, Gail and Domat, to mention but a view.*³⁴⁶ (Emphasis added)

According to Barns and Thompson,³⁴⁷ it is apparent from the above mentioned *obiter dictum* that Roman-Dutch principles are preferred over other external ones like the Domat's Gloss, especially when the relevant Roman-Dutch principle is sufficient to deal with the issue at hand. They submit that if the existing Roman-Dutch law principle is applied, it will be unnecessary to extend the grounds of unworthiness and to also refer to Domat's Gloss. According to them, the courts fail to explain the need for reliance on Domat. Furthermore, Barns and Thompson also point out that, in order to extend categories of unworthiness to inherit, a sound theoretical basis that is inspired by prevailing law is needed. The terms 'equity' and 'good manners' are elusive, wide, and open-ended concepts and an unbridled utilisation of these concepts can result in unintended consequences. They observe that, throughout the years, our courts indicated that, unlike in other legal systems like the English one, our courts are not functioning as courts of equity.³⁴⁸ They believe that, in applying Domat's Gloss, far too wide discretion are given to the courts to extend the current grounds of unworthiness based on what courts subjectively think is fair and just.

³⁴⁶ *Du Plessis v Strauss* 149E.

³⁴⁷ De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 128.

³⁴⁸ *Estate Thomas v Kerr* (1903) 20 SC 354 366; *Bothwell v Union Government (Minister of Lands)* 1917 AD 262 269; *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 610.

Chapter 4: Extension of the common law grounds of unworthiness to fields *outside* the law of succession: Reasons and criticism

1 Introduction

Schoeman-Malan³⁴⁹ emphasises that the Roman-Dutch principle of unworthiness is indisputable rooted in the South African law. The uncertainties that are sometimes raised regarding the basis of the principle can be attributed to the existing perception that the application of the *bloedige hand* maxim is limited to the law of succession. However, it is clear from the Roman-Dutch sources as well as from existing case law that the application is not limited.³⁵⁰ Apart from the fact that a wrongdoer will be unworthy to inherit from his victim, he will, in a wider application of the principle, be unworthy to benefit in any other way from his own wrongful conduct.³⁵¹ It can therefore be possible to be declared unworthy to inherit in terms of a deceased estate, but also to be unworthy to take any other benefits that fall outside of the deceased estate.³⁵² The reasonable foreseeability test is applied for determining whether or not a legal chain exists between the conduct and benefit.³⁵³ Where a person is murdered, the necessarily consequences will be that the victim's estate will fall open, policies will be paid out, pension benefits becomes payable, marriage will terminate and maintenance claims expires. The perpetrator will therefore not be able to argue that there is not a legal chain between the death and the benefit.³⁵⁴

2 Matrimonial property benefits

If spouses are married in community of property, the surviving spouse is automatically be entitled to half-share of the joint estate – this is because of the fact that they are co-owners of the joint estate, and not because of the rules of

³⁴⁹ “Privaatregtelike perspektief op onwaardigheid om te erf – die uitwerking van gesinsmoorde” 2013 *LitNet Akademies* 113 141.

³⁵⁰ Du Toit “Erfregtelike onwaardigheid: Enige lesse te leer vir die Suid-Afrikaanse reg uit die Nederlandse reg?” *Stellenbosch Regstydskrif* 2012 137 146.

³⁵¹ SALC “Hersiening van die erfreg” 1991 par 4 3.

³⁵² *Leeb v Leeb* 1992 (2) All SA 588 (N); *Danielz NO v De Wet* 2009 (6) SA 42 (C); *Makhanya v Minister of Finance* 2001 (2) SA 1251 (D); *Marais v Botha* (2008) ZAWCHC 111.

³⁵³ *Ex parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T) 752F-G.

³⁵⁴ Schoeman-Malan 2013 *LitNet Akademies* 113 121.

succession.³⁵⁵ Similarly, a surviving spouse who was married out of community of property with the application of the accrual system may be entitled to claim half the difference between the amounts by which their respective estates increased while they were married – this is also because of the applicable matrimonial property system and not because the surviving spouse inherits it.³⁵⁶ The situation is problematic where one spouse is unworthy to inherit, but still entitled to a half share of the joint estate. Curlewis³⁵⁷ advises the executor with regard to the finalisation of the estate account in such a scenario:

“Should the liquidation and distribution account be drawn up as suggested, then there is probably no need to apply for a declaratory order. Should the executrix (or the surviving spouse) however, persist and decide to approach the High Court for a declaratory order that the surviving spouse is entitled to inherit from the deceased, such an applicant will in all probability fail.”

The question arises whether or not the general common law principle of unworthiness, and specifically the *bloedige hand* maxim, can be extended to have application to fields outside the law of succession.

The case of *Ex parte Vonzell*³⁵⁸ addresses the capacity of spouses married in community of property to share in the benefits of the joint estate when one spouse caused the death of the other. In this case the couple was married in community of property. The applicant (Mr Vonzell) murdered his wife. Prior to Mrs Vonzell’s (the deceased) death, she applied for an interdict that will prohibit the applicant from drawing on money which she had inherited and which was deposited to the credit of the applicant’s bank account. After his wife’s death, the applicant applied for an order to cancel this interdict, because he argued that he is entitled to one half share of the money on basis of their marriage in community of property. The deceased’s executor opposed this application, arguing that the applicant would benefit from his

³⁵⁵ According to the *Badenhorst* test provided by the Supreme Court of Appeal “To succeed in a claim that trust assets be included in the estate of one of the parties to a marriage there needs to be evidence that such party controlled the trust and but for the trust would have acquired and owned the assets in his own name. Control must be *de facto* and not necessarily *de iure*.” (See *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) 260I.)

³⁵⁶ Paleker in Jamneck *et al* (eds) *The Law of Succession in South Africa* (2012) 109.

³⁵⁷ *Ordenuus* (2012-07-27) 5. See also Sonnekus “Onwaardigheid vir erfopvolging én versekeringsbegunstiging” 2010 *TSAR* 176 184; Du Toit 2012 *Stellenbosch Regstydskrif* 137 154.

³⁵⁸ 1953 (1) SA 122 (C).

own wrongdoing since he would have had no claim against the joint estate if he had not murdered his wife. The application was granted. Hall J held that the application is based upon the ground that, owing to the death of Mrs Vonzell, the action for judicial separation and forfeiture of the benefits can no longer be proceeded with and that, therefore, the interdict is no longer operative. The applicant avers, moreover that he is entitled, by virtue of the marriage in community of property, which is now dissolved by the death of his wife, to one half of the assets in the joint estate at the time of her death. He also held that, seeing that the marriage is dissolved through the death of one of the spouses, it is no longer possible for the court to determine an action based upon their matrimonial differences, and for this reason he is of the opinion that the interdict in its present form cannot remain operative and should be discarded. The decision in *Ex parte Vonzell*³⁵⁹ is greatly criticised by Hahlo³⁶⁰, since the applicant does in fact benefit from his own wrongful act. In the present case, the deceased contributed a lot more to the estate in community of property than the applicant. Hahlo³⁶¹ argues that although he does not automatically forfeit his half-share of the joint estate, the applicant should forfeit the financial benefits which he derives from community in a case where the other spouse contributed more to the joint estate than he did. In this case, the applicant will be in a better position by murdering his wife, than he would have been if he decided to end the marriage through divorce. This, according to Hahlo,³⁶² cannot be the law.

The judicial precedent set in *Ex parte Vonzell*³⁶³ is followed in *Nell v Nell*.³⁶⁴ In this case, the parties were married in community of property. The wife murdered the husband, who died intestate. The question was whether Mrs Nell would derive a benefit through her wrongful conduct if she should receive her half of the joint estate. She only advanced the termination of the marriage with the subsequent benefits, but she does not receive any additional benefits from her wrongful act. Human J cannot find any grounds upon which to prohibit Mrs Nell from receiving benefits from the marriage in community of property.³⁶⁵ Hahlo³⁶⁶ also does not agree with this

³⁵⁹ 124.

³⁶⁰ "Forfeiture by murder" 1953 *SALJ* 1.

³⁶¹ 1953 *SALJ* 1.

³⁶² 1953 *SALJ* 1.

³⁶³ 125.

³⁶⁴ 1976 (3) SA 700 (T).

³⁶⁵ *Nell v Nell* 704-705.

decision. He observes that the judge himself indicates that the benefits are in fact advanced through the murder, and that the accused does in fact benefit from her own wrongful conduct. However, the Law Commission³⁶⁷ recommends that the present position stays the same. The commission is not convinced that the community's interests will be better served if the perpetrator also forfeits that which legally belongs to him under matrimonial property law.

In the case of *Leeb v Leeb*³⁶⁸, Thirion J comes to a different and arguably better conclusion. The wife was already convicted of the murder of her husband. They were married in community of property. Thirion J held that:

"It would seem to me that there is good reason for applying the principles of unworthiness also to the benefits of the marriage in community of property so as to deprive the unworthy spouse of those benefits. At common law the spouse through whose fault the marriage ends in divorce forfeits the benefits of the marriage in community of property. There seems to be every reason why the spouse who chooses to obtain his freedom through *murder rather than divorce*, should be in no better position."³⁶⁹ (Emphasis supplied)

In the Dutch case of Breda,³⁷⁰ the court had to decide on the matrimonial property division where the wife was convicted of the murder of the husband. The court held that the wife does indeed benefit from the death of her husband, because she receives a benefit according the matrimonial property regime. Taking into account section 6:23:2 of the *BW*³⁷¹, the court held that the high demands that reasonableness and fairness set to a marriage regarding the matrimonial property, it will be unacceptable for the wife to benefit from the matrimonial property regime while she participated in his killing.

Another Dutch case, the so-called *Van Wylick*-case, shows a lot of similarity to the *Leeb*-case. A woman was convicted of the murder of her somewhat older husband with whom she was married in community of property. According to the court, there seems to be good reasons why unworthiness should also be applicable to

³⁶⁶ "Murder rewarded" 1976 *SALJ* 259 376.

³⁶⁷ SALC "Hersiening van die erfreg" 1991 par 4 3.

³⁶⁸ 1999 (2) All SA 508 (N).

³⁶⁹ *Leeb v Leeb* 595.

³⁷⁰ Regbank Breda (25 November 2009); *LJN* BA 9662; <http://zoekenrechtspraaknl/default.aspx>.

³⁷¹ This section states: "Wanneer de partij die bij de vervulling [ingevolge 'n voorwaardelike verbintenis] belang had, deze heft teweeggebracht, gelde de voorwaarde als niet vervuld, indien redelijkheid en billijkheid dit verlangen."

matrimonial property benefits that arise from the dissolution of a marriage in community of property. The importance of the court's *ratio decidendi* is as follows:

“[I]t is not correct to say that the spouses when contracting a marriage in community of property become entitled as of right and as a matter of law to a division of the joint estate in equal shares on dissolution of the marriage through the death of one of the spouses. A spouse's ‘entitlement’ to a division of the joint estate in two equal parts on the death of the other spouse, is during the subsistence of the marriage, subject to the uncertain future event that the marriage might not be ended by the death of the other spouse but that it might end in divorce with an order of forfeiture of the benefits of the marriage.³⁷² If a spouse were to remove that uncertainty by murdering the other spouse he would, in the case where he had not made a contribution or had made the lesser contribution to the joint estate, obtain a benefit from his crime on division of the joint estate in two equal parts. He would not merely obtain an acceleration of the division of the joint estate. He would obtain a division of the joint estate in equal parts whereas but for the murder the marriage would have continued and might have ended in a divorce in which he would have forfeited the benefits of the marriage. His conduct in murdering the other spouse would be the direct and immediate cause of the dissolution of the marriage, a direct result of which would be that there would, unless the law were to step in and deprive him of it, be a division of the joint estate in which he would obtain half of the excess of the deceased spouse's contribution over his own – which he might not have obtained had there been a divorce... I therefore come to the conclusion that where one of the two spouses to a marriage in community of property, murders the other, the court has the power to order that the spouse who committed the murder, *forfeits, by reason of the murder, the benefits of the marriage in community of property*’.³⁷³ (Emphasis supplied)

The most recent case dealing with this matter is *Danielz NO v De Wet*.³⁷⁴ Traverso AJP had to decide whether Mrs de Wet could benefit indirectly from the life insurance policy by virtue of her claim to a half share of the joint estate. She held that, by law, the joint estate terminates on the deceased's death.³⁷⁵ It is only after the deceased's death that rights in respect of the death benefits arise,³⁷⁶ because before that date the proceeds of the policies did not exist,³⁷⁷ and there was not even certainty that a claim would ever be made under the policies and, therefore, Mrs de

³⁷² According to s 9 of the Divorce Act 70 of 1979.

³⁷³ 598C-J.

³⁷⁴ 2008 (4) All SA 459 (C).

³⁷⁵ *Danielz NO De Wet* 2009 (6) SA 42 (C) par [42].

³⁷⁶ *Danielz NO De Wet* par [43].

³⁷⁷ *Danielz NO De Wet* par [41].

Wet cannot benefit from them indirectly by virtue of her right to a half share of their joint estate.³⁷⁸

Wood-Bodley³⁷⁹ criticises the decision by Traverso AJP that the proceeds of the policy does not fall into the joint estate. He refers to Meyerowitz³⁸⁰ who states that, where an insurance policy is payable to a deceased and if the policy is on his life, then the full proceeds of the policy should be shown in the estate account. No reference is made to the policy constituting separate property of the deceased where there is a joint estate. Wood-Bodley³⁸¹ also points out that the available case law are not consistent regarding the issue at hand. As an example he refers to the cases of *Hees v Southern Life Association Ltd*³⁸² and *Warricker NNO v Liberty Life Association of Africal Ltd*.³⁸³ In this case, Claassen J states that the policy and monetary proceeds thereof do not vest in the deceased estate.³⁸⁴ However, in the *Warricker-case*, Van Oosten J held that an insured's right to proceeds deriving from policies does indeed vest in the insolvent estate.³⁸⁵ Wood-Bodley³⁸⁶ concludes on this matter by arguing that the applicable principle should still be that no person may be enriched by his own unlawful conduct or benefit from conduct that is punishable. He argues that this principle is sufficient to deprive an unworthy person of that portion of the joint estate.³⁸⁷ He does, however, point out that obtaining an order for forfeiture of the matrimonial property benefits of a marriage in community of property, as the case was in *Leeb v Leeb*,³⁸⁸ will not automatically prevent the unworthy person from sharing in the proceeds of the policy.³⁸⁹ The purpose of such a forfeiture order is not to deprive the unworthy person from all claims to share in the

³⁷⁸ *Danielz NO De Wet* par [33] – [34].

³⁷⁹ “Forfeiture by a beneficiary to conspires to assault with intent to do grievous bodily harm: *Danielz NO v De Wet* 2009 (6) SA 42 (C)” 2010 *SALJ* 30 35.

³⁸⁰ Meyerowitz *The Law and Practice of Administration of Estates and Estate Duty* 2007 15 35.

³⁸¹ 2010 *SALJ* 30 35.

³⁸² 2000 (1) SA 943 (W).

³⁸³ 2003 (6) SA 272 (W).

³⁸⁴ *Hees V Southern Life Association Ltd* 2000 (1) SA 943 (W) 948D-E.

³⁸⁵ *Warricker NNO v Liberty Life Associating of Africa Ltd*. 2003 (6) SA 272 (W) par [12].

³⁸⁶ 2010 *SALJ* 30 35.

³⁸⁷ Wood-Bodley 2010 *SALJ* 30 35.

³⁸⁸ (1992) 2 All SA 588 (N).

³⁸⁹ Wood-Bodley 2010 *SALJ* 30 35.

joint estate, but rather that the unworthy person takes either half of the joint estate or the sum of his contributions to the joint estate, whichever is less.³⁹⁰

Although these judicial precedents assist in providing some guidance as to how one should deal with the conflict between an existing matrimonial property system and the application of the unworthiness principle, the situation is still somewhat unresolved, because there is yet to be a Supreme Court of Appeal decision on the matter. Sonnekus³⁹¹ recommends that it must be considered to make provision by way of a General Amendment Act for a general civilian death prescription for those cases that might be problematic. The determination must enable the courts to, in future, just make reference to the general unworthiness principle³⁹² and then find that the person is unworthy to receive matrimonial or insurance benefits. This proposal comprises a formulation based on the common law principle, but will not necessarily bring legal certainty, because loopholes still exist within the matrimonial property law. Proposed legislation will have to address the law of succession and the matrimonial property law simultaneously.

The situation is still unclear, and the position in the Dutch law also reflects conflicting judgments. In the so-called *Van Wylick*-saak, unworthiness is extended to the matrimonial property benefits. *In casu* an elderly woman married her significantly younger nurse, who struggled financially. About five weeks after their marriage, the woman was murdered by her younger husband. The couple did not enter into any agreement regarding their patrimonial property, and were therefore, just like the case would be according to South African law, married in community of property. The husband was sentenced, and therefore also, according to section 4 885 of the *BW*, unworthy to receive any succession benefit from his wife's deceased estate. The question, however, is whether the husband can insist on the division of the joint estate in community of property. The court held that a person who intentionally causes the death of another has no right to receive any type of benefit from the deceased, and therefore the husband was unworthy to receive half of the joint

³⁹⁰ *Leeb v Leeb* 597. See par [3] below for a discussion of insurance policies where the premiums that have been paid during the subsistence of the marriage will have come out of the joint estate, and it would seem to follow that the proceeds of the policy are fruits of joint contributions of spouses.

³⁹¹ "Onwaardigheid vir erfopvolging én versekeringsbegunstiging 2010 *TSAR* 176 183.

³⁹² See ch 2 above for a discussion of the unworthiness principle.

estate.³⁹³ Du Toit³⁹⁴ notes that it seems as though the principle of reasonableness and fairness influenced the court's argument significantly.³⁹⁵

3 Insurance benefits and policies

In the case of *Danielz NO v De Wet*,³⁹⁶ Mrs De Wet was the nominated beneficiary to the proceeds of the deceased's policy. However, Traverso AJP held that she is not entitled to benefit. She indicates that an insured is not allowed to claim indemnification if he intentionally precipitated the risk insured against,³⁹⁷ nor if the insured causes himself to be unworthy by his intentional criminal conduct that is

“so connected with the risk and so repugnant to *good morals*, that *public policy* requires that the assured cannot claim the benefit under the policy”.³⁹⁸ (Emphasis supplied)

Although Mrs de Wet cannot be unworthy on the first ground mentioned, because she did not intentionally kill her husband, Traverso AJP held that public policy will indeed require that she be found unworthy based on the second ground, because she planned and participated in the vicious assault of her husband which ultimately caused his death.³⁹⁹ She is supported in her conclusion by a decision of the English Court of Appeal in *Gray v Barr*.⁴⁰⁰ In this case the insured took a gun to the house of his wife's lover. He only intended to threaten the lover, but in the course of an ensuing altercation between the two men a shot was fired and the lover was killed. Although the accused was acquitted in the criminal proceedings, he was sued by the

³⁹³ Hoge Raad (7 December 1991) *Nederlandse Jurisprentie* 1991 593.

³⁹⁴ *Stellenbosch Regstydskrif* 2012 137 146.

³⁹⁵ The decision of the court gave rise to different opinions under commentators. Waaijer (“Onwaardigheid in het Huwelijksvermogensrecht?” 1989 5918 *Weekblad voor Privaatrecht Notariaat en Registratie* 329 330) argued that the origin of community of property does not hold any benefit for the parties to the marriage and, therefore, that the husband was not benefited through the killing of his wife. He should not be unworthy to receive his half of the joint estate upon dissolution of the marriage, even if the dissolution was brought about through death that the husband caused. Waaijer further states that the court is not allowed to, based on the principle of reasonableness and fairness, move away from the law regarding the division of a marriage in community of property. (330-331) Meijer (See “Crime Does Not Pay” 1989 5926 *Weekblad voor Privaatrecht Notariaat en Registratie* 466 467) came to a different conclusion. He said that the circumstances surrounding the marriage and death of the wife and the subsequent division of the joint estate did benefit the husband and that he should be unworthy to receive this benefit in terms of their marriage in community of property. He supported the courts approach to apply the principles of reasonableness and fairness.

³⁹⁶ 2009 (6) SA 42 (C).

³⁹⁷ par [27].

³⁹⁸ par [27].

³⁹⁹ par [33].

⁴⁰⁰ 1971 2 All ER 949 (CA).

widow in a civil claim for compensation. He sought to be indemnified by an insurer against this claim in terms of a policy that covered him against liability to others arising from accidents. All three judges agree that in the circumstances of the case any such claim to indemnity must fail on grounds of public policy.⁴⁰¹ It was held that an insured cannot claim in terms of an insurance policy if he is guilty of intentional and unlawful acts of violence that resulted in death, even though death might have been unintended.⁴⁰²

The *Danielz*-case can be compared to the situation in the Dutch law, where the *BW* contains certain provisions that are similar to South African law. Section 7 976 of the *BW* provide the following with regard to the so-called *sommenverzekering*.⁴⁰³

“Aan de overeenkomst kunnen geen rechten worden ontleend door degeen die onherroepelijk veroordeeld is ter zake dat hij de verwezenlijking van het risico opzettelijk teweeg heft gebracht of daaraan opzettelijk meegewerkt heeft.”

A similar decision is made in the English case of *Cleaver v Mutual Rescue Fund Life Association*.⁴⁰⁴ In this case a woman was accused and convicted of murdering her husband. She was the beneficiary in terms of a life insurance policy that the deceased took out. The Court of Appeal applies the forfeiture rule and held that the wife cannot lay any claim to the insurance money by reason of her crime.

4 Pension fund benefits

The case of *Makhanya v Minister of Finance*⁴⁰⁵ raises an interesting question regarding the unworthiness of a killer to receive pension fund benefits from his victim. The deceased was an employee of the South African Police Services. His spouse was accused and convicted of his murder. On the deceased's death, certain pension benefits became payable to the accused in terms of the Government Service Pension Act 57 of 1973. The deceased's wife petitioned the Department of

⁴⁰¹ In the case of *Shooter t/a Shooter's Fisheries v Incorporated General Insurances* 1984 (4) SA 269 (D) Friedman J stated with respect to possible forfeiture of an insurance claim that “public policy is a rather fluid concept which may vary according to time, to place and to facts and circumstances, [and] it seems to me that the only principle to be deduced from the foregoing is that, depending upon the nature of the crime and upon all other relevant facts and circumstances, it may be against public policy to permit a claim under a policy of insurance where the accused has been guilty of either illegal or unlawful activities.” (284B-D).

⁴⁰² *Danielz NO v De Wet* par [31] read with par [32] and [33] referring to *Gray v Barr* 1971 2 All ER 949 (CA) 965 last par.

⁴⁰³ Meaning “benefit insurance”.

⁴⁰⁴ 1892 1 QB 147.

⁴⁰⁵ 2001 (2) SA 1251 (D).

Finance for payment of these benefits. The applicant in this case (the deceased's daughter) instituted proceedings in the High court to prevent the deceased's wife from receiving aforementioned pension benefits. The question is therefore whether a person that is unworthy to inherit from his victim, is also unworthy to receive other benefits from the deceased, such as pension benefits. The court refers to public policy, where a person who unlawfully kills another is precluded to acquire a benefit in consequence of the killing, and there should be no reason why this should be limited only to benefits accruing directly from the estate of the victim.⁴⁰⁶ The court sets a new judicial precedent that, if a spouse is convicted of murder, public policy requires the *bloedige hand* maxim to be extended to cover all benefits accruing to the spouse as a consequence of the deceased's death. This will include pension benefits.

5 Claims for maintenance and legal costs

Two questions arise regarding maintenance and legal cost: In the first place, whether the perpetrator can claim maintenance from his victim's estate and secondly whether he is entitled to legal costs from the estate of the person he killed. In principle, dependent children have a claim for maintenance against the deceased estates of their parents.⁴⁰⁷ However, it is unclear whether the common law claim for maintenance or the statutory claim of a spouse in terms of the Maintenance of Surviving Spouse Act 27 of 1990 will expire if the dependent causes the death of the deceased.⁴⁰⁸

The recent and well-known case of *S v DD*, also known as the "Griekwastad-plaasmoorde," arouses a lot of interest among the general public regarding this matter. Don Steenkamp was accused and convicted of the murders of his parents, Don and Christel Steenkamp, as well as his sister, Marthella Steenkamp. He was the only beneficiary in terms of his deceased parents' joint will, and his legal fees during the criminal case were paid out of the deceased estate. When Don Steenkamp was initially released on bail, he also received an amount of R7500 per month out of the deceased estate for his maintenance.⁴⁰⁹ Schoeman-Malan⁴¹⁰

⁴⁰⁶ *Makhanya v Minister of Finance* 1254D.

⁴⁰⁷ *Carelse v Estate de Vries* (1906) 23 SC 532.

⁴⁰⁸ Corbett Hofmeyr and Kahn *The Law of Succession in South Africa* (2001) 101.

⁴⁰⁹ *Rapport* (2014-11-17).

⁴¹⁰ "Die 'bebloede hand' en die boedel" 2012 *Huisgenoot* 11.

discusses the relevance between the Griekwastad-case and the *bloedige hand* maxim. She explains that it is possible for an unworthy minor to receive money from the deceased estate for his maintenance, but this has not been tested in our courts before, and each situation will be judged on its own merits. If such a claim does indeed succeed, it will be limited to funds for normal, necessary maintenance that a minor can expect from his parents. It will likely not include funds to pay legal fees.⁴¹¹

In *S v Lotter*⁴¹² the two accused were major dependents. They were accused of their parents' murders. They instituted a claim against the deceased estate of their parents. They argued that they are entitled to inherit, and they need their inheritance for maintenance. The claim was dismissed by the court on grounds of the rule that a person cannot benefit from his own wrongdoing.⁴¹³ Except for maintenance, the accused also claimed their inheritance in order to pay their legal fees. Their legal representative argued that they are presumed innocent until proven guilty.⁴¹⁴ The court dismisses the claim and held that they are unworthy to inherit or to claim legal fees from their parents' deceased estates.⁴¹⁵

In *Caldwell v Erasmus*⁴¹⁶ a father was accused of murdering his son. While awaiting trial, he made an application in terms of which he claimed maintenance for him and his daughter as well as for a special diet in prison to be paid out of his son's deceased estate. He also made an application for his defence to be funded out of the deceased estate. Blackwell J observes that:

"If it should transpire that the accused is guilty of murdering his son, he would be held in law *indignus and unworthy to succeed*. The Roman Dutch law would appear to go even further and hold that even if the heir had 'any hand in the death of the deceased though it only is by neglect, he would be indignus."⁴¹⁷ (Emphasis supplied)

Blackwell J notes that he would prefer to come to the same conclusion on the principle followed in the English law.⁴¹⁸ According to this legal system, it is against public policy that a person who is guilty of feloniously killing another should take any

⁴¹¹ Schoeman-Malan 2012 *Huisgenoot* 11.

⁴¹² (2012) ZAKZDHC 50.

⁴¹³ Schoeman-Malan 2013 *LitNet Akademies* (3) 113 134.

⁴¹⁴ News24 (2009).

⁴¹⁵ Schoeman-Malan 2013 *LitNet Akademies* (3) 113 136.

⁴¹⁶ 1952 (4) SA 43.

⁴¹⁷ *Caldwell v Erasmus* 44.

⁴¹⁸ *Caldwell v Erasmus* 49E-F.

benefit from that person's estate or under that person's will, as was decided in *Hall v Knight and Baxter*.⁴¹⁹ Blackwell J held that the expenses necessary to prove that the applicant will need counsel and attorneys of his own choosing cannot be called a necessity. He states that it is well known that the state provides counsel should an accused not be able to afford one. Therefore, the claim is not for a necessity, but for a luxury and cannot be granted.⁴²⁰

There is no primary authority regarding the unworthiness of a minor dependent in terms of a claim for maintenance against the deceased estate.⁴²¹ Du Toit⁴²² suggests that each case should be considered on its own merits while taking into account the need that one person has for maintenance, and the ability of the deceased estate to pay the maintenance. If it must be decided whether or not to grant a minor's claim for maintenance against the deceased estate of his parent(s) the court must consider the general principles of maintenance claims as well as the general principles of unworthiness. It can be argued that a minor who killed another can also not take any benefit from his victim. It seems only fair that this should include the benefit to receive maintenance from the deceased estate. The same principles should probably be applicable to maintenance claims from a person who kills his spouse. Du Toit states that a maintenance claim must be just, fair and legitimate.⁴²³ Corbett *et al*⁴²⁴ mention that although it is accepted that the issue is whether the surviving spouse is in fact in need of maintenance, and not whether he has a right to inherit from the deceased estate, the legislature could not have intended that the misconduct would never be relevant. The problem is that once it is admitted that the perpetrator is disqualified from receiving maintenance, it is not always clear where the line should be drawn. Should it be the case that a surviving spouse who murders the predeceased spouse should only be unworthy to receive maintenance in extreme cases?

⁴¹⁹ 1914 P 1 CA.

⁴²⁰ *Hall v Knight and Baxter* 1914 P 1 CA 510H-J. Section 1 399 of the BW in the Dutch law provides that a court can temper the maintenance responsibility *inter vivos* on grounds of the behaviour of the maintenance dependent. Dutch courts did make such an order in the past (See Hof's-Hertogenbosch 23 September 1980 *Nederlandse Jurisprudentie* 1981 324).

⁴²¹ Du Toit 2012 *Stellenbosch Regstydskrif* 137 148.

⁴²² 2012 *Stellenbosch Regstydskrif* 137 148.

⁴²³ 2012 *Stellenbosch Regstydskrif* 137 151.

⁴²⁴ Voet 34.9.6.

To conclude this matter it can be accepted that no person should be allowed to a claim for maintenance or legal fees against the estate of the deceased whose death he caused.⁴²⁵ A claim to this effect should therefore not succeed.

6 *Inter vivos* trusts

The distinction between a testamentary trust and an *inter vivos* trust is an important one. A testamentary trust is created by using the rules of the law of succession, and must therefore also comply with the requirements for a valid will.⁴²⁶ On the other hand, the *inter vivos* trust is created by agreement during the lifetime of the founder by using the rules of law of contract.⁴²⁷ When applying the *bloedige hand* maxim to a testamentary trust, the situation is clear. Since the trust only comes into existence on the death of the founder, any beneficiary who causes the death of the deceased will be unworthy to inherit from that testator due to the application of the *bloedige hand* maxim. The question with *inter vivos* trusts is whether an unworthy person can still be a beneficiary in terms of such an ongoing trust. An *inter vivos* trust is an agreement between living people, and the rules of the law of succession – including the *bloedige hand* maxim – are not applicable.⁴²⁸ In this type of trust, the creator/founder of the trust enters into an agreement with the trustee, in terms of which the founder undertakes to donate certain assets to the trustee in such a capacity. The trustee must then use these assets for the benefit of a third person, called a trust beneficiary.⁴²⁹ This question is well explained in the abovementioned Griekwastad case. The deceased parents created 2 *inter vivos* trusts during their lifetime, and put the bulk of their assets, including all the farms that they owned, into these trusts. These trusts were created in 2003. The accused was the only beneficiary in terms of the first trust, and his deceased sister the only beneficiary of the second trust. The problem with this situation is that the trusts were created during the lifetime of the deceased, and not in terms of a will. The situation regarding direct bequests is clear – an unworthy person cannot take such a benefit from a will. But due to loopholes in our law, it seems as though it might be possible for an unworthy beneficiary to take a benefit under an *inter vivos* trust.

⁴²⁵ Schoeman-Malan 2013 *LitNet Akademies* (3) 113 134.

⁴²⁶ Corbett *et al* (2001) 101.

⁴²⁷ Corbett *et al* (2001) 101.

⁴²⁸ Paleker in Jamneck in *et al* (eds) 11.

⁴²⁹ Paleker in Jamneck *et al* (eds) 175.

7 Conclusion

Sonnekus and Van der Walt⁴³⁰ support the approach that the grounds of unworthiness should not be extended to the normal legal consequences of the dissolution of a marriage. According to them, another conclusion will lead to confusion between the rules of succession and the law of matrimonial property. On the other hand, Hahlo⁴³¹ criticises the *Vonzell* and *Nell* decisions. He agrees that a spouse that kills the other spouse should not automatically forfeit his half-share in the joint estate; he argues that this does not mean that he should not forfeit the financial benefits derived by him by reason of the fact that his own contributing to the joint estate was less than those of his wife. Another conclusion will not be in line with the principle that a person should not be allowed to benefit from his will.

Voet⁴³² states that a person will be unworthy and disqualified from taking a benefit under a will or on intestacy if he prevents a testator from making a will by using duress or fraud. This ground for disqualification has never been addressed by our courts⁴³³ but, having regard to the policy consideration that no one should be permitted to benefit from his own wrongful act, it can be predicted that Voet's statement will be implemented by our courts, should the occasion arise. The same writers suggest that this principle applies equally to a person who by duress or fraud (which, it is submitted, must be taken to include undue influence) causes a testator to make a will or a particular bequest in such person's favour.⁴³⁴ In the latter case, however, the testator will not have exercised his free will, and the will or bequest will in any event be invalid on account of not adhering to the requirements of a valid will.⁴³⁵

⁴³⁰“Onwaardigheid vir erfopvolging en versekeringsbegunstiging” 2010 *TSAR* 176.

⁴³¹ “The bloedige hand erft niet” 1952 *SALJ* 138.

⁴³² 29 6 1. Voet also held the view that the person so acting was liable in damages to the person who suffered loss as a result of his actions (29 6 2).

⁴³³ If a person who conceals a will is recognized in our law as unworthy and disqualified, the disqualification should be equally applicable to a person who seeks to prevent an act of testation by fraud or duress. This submission was quoted with apparent approval in *Pillay v Nagan* 2001 (1) SA 410 (D) 424G-H.

⁴³⁴ Voet 29 6 1

⁴³⁵ Corbett *et al* (2001) 85.

Chapter 5: Conclusion and recommendations

In this study, the *bloedige hand* maxim is discussed as one of numerous Roman-Dutch grounds of unworthiness to inherit.⁴³⁶ According to De Waal and Zimmermann,⁴³⁷ it seems as though the highly criticised policy-based approach has turned the *bloedige hand* maxim into a vague principle that can be applied in novel situations such as the one in *Danielz NO v De Wet*.⁴³⁸

In modern South African law, many of the specific grounds of disqualification recognised in the seventeenth and eighteen centuries became obsolete.⁴³⁹ Today the question is whether South African law practitioners should move beyond the specific grounds in search of a general underlying principle of unworthiness to rely on.⁴⁴⁰ This idea came forward early in the twentieth century in *Taylor v Pim*.⁴⁴¹ In this case the plaintiff asked for an order to set aside a will in terms of which the defendant had been appointed as the sole heir of the deceased. Bale CJ grants the order on the basis that the defendant caused the deceased to fall from a moral and honourable life to an immoral and degraded one, that his conduct with the deceased was adulterous in nature, that he exposed her to and provided her with alcohol when he was aware that she was not allowed to consume alcohol for medical reasons and also that he failed to provide her with medical care when she needed it.⁴⁴² Barns and Thompson⁴⁴³ observe that it would seem as if the idea of having a generalised unworthiness category was never part of the Roman-Dutch system. The situation will have to be clarified by a Supreme Court of Appeal. The High Courts in *Pillay v Nagan*⁴⁴⁴ and *Danielz NO v De Wet*⁴⁴⁵ did, however, accept that the possibility of such a category does exist in South African law. These courts come to the

⁴³⁶ De Waal and Zimmermann “The meaning and application of the *bloedige hand* rule in the Roman-Dutch and modern South African law of succession” in Mostert and De Waal (eds) *Essays in Honour of CG Van der Merwe* (2011) 169 188.

⁴³⁷ Mostert *et al* (eds) *Essays in Honour of CG Van der Merwe* (2011) 169 190.

⁴³⁸ 2009 (6) SA 42 (C).

⁴³⁹ De Waal and Zimmermann in Mostert *et al* (eds) *Essays in Honour of CG Van der Merwe* (2011) 169 188.

⁴⁴⁰ De Waal and Zimmermann in Mostert *et al* (eds) *Essays in Honour of CG Van der Merwe* (2011) 169 188.

⁴⁴¹ (1903) 24 NLR 484.

⁴⁴² *Taylor v Pim* (1903) 24 NLR 484 493.

⁴⁴³ “Reconsidering the indignus principle in the South African law of succession” in De Waal and Paleker *South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 124.

⁴⁴⁴ 2001 (1) SA 410 (D).

⁴⁴⁵ 2009 (6) SA 42 (C).

conclusion by relying principally on Domat. Barns and Thompson⁴⁴⁶ submit that this reliance on Domat and the subsequent conclusion that there seems to be a general underlying category of unworthiness in the South African law are unwarranted and jurisprudentially unsound. They further state that:

“the risk of opening the legal floodgates to spurious claims is yet another reason to suggest that reliance on Domat’s Gloss should be approached with caution.”⁴⁴⁷

Barns and Thompson⁴⁴⁸ argue that, to rely on public policy as a ground for unworthiness, does not carry the approval of the Supreme Court of Appeal.⁴⁴⁹ They further point out that it is clear that Roman-Dutch authors should be favoured over continental ones,⁴⁵⁰ and if the Roman-Dutch law is sufficient to deal with a situation, it is unnecessary to extend the grounds of unworthiness to include public policy.⁴⁵¹ Barns and Thompson⁴⁵² submit that the general principle of unworthiness – that no one can benefit from their own wrongful act or conduct which is punishable – is sufficient enough to include any wrongdoing towards the deceased, and that reliance on Domat is unnecessary. The courts fail to explain why it is necessary to rely on Domat.⁴⁵³ The writers suggest that a sound theoretical basis inspired by existing law is needed to justify new categories of persons who are disqualified from inheriting.⁴⁵⁴ They further emphasise that:

“‘equity’ and ‘good manners’ are *elusive, wide, and open-ended concepts* and an unbridled utilisation of these concepts can result in unintended consequences”.⁴⁵⁵ (Emphasis added)

⁴⁴⁶ De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 124.

⁴⁴⁷ Barns and Thompson in De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 127.

⁴⁴⁸ De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 127.

⁴⁴⁹ As discussed in *Potgieter v Potgieter* 2012 (1) SA 637 (SCA) par [34].

⁴⁵⁰ See also *Bank of Lisbon and South African v De Ornelas* 1988 (3) SA 580 (A).

⁴⁵¹ Barns and Thompson in De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 123 128.

⁴⁵² De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 128.

⁴⁵³ Barns and Thompson in De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 128.

⁴⁵⁴ Barns and Thompson in De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 128.

⁴⁵⁵ Barns and Thompson in De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 128.

Our courts note on numerous occasions that, unlike other legal systems, for example the English system, our courts are not courts of equity.⁴⁵⁶ Barns and Thompson⁴⁵⁷ are of the opinion that courts, when applying Domat's Gloss, will have a far too wide discretion to extend existing grounds of unworthiness based on public policy.

As early as the *Taylor*-case, Bale J pointed out that some of the Roman-Dutch grounds of unworthiness to inherit might have become obsolete because it does not keep up with the spirit of modern times.⁴⁵⁸

In *Ex parte Steenkamp and Steenkamp*⁴⁵⁹ Steyn J is reluctant to accept that the grounds of unworthiness mentioned by the Roman-Dutch authors can be extended by way of interpretation.⁴⁶⁰

In the more recent case of *Pillay v Nagan*⁴⁶¹ the court adopts a different approach. McCall J had to decide whether a person who forged a will could inherit from the person whose will he forged. To forge someone's will is not one of the grounds of unworthiness mentioned by the Roman-Dutch authors. McCall J does, however, use an existing ground, namely the disqualification of a person who hides the last will of the testator,⁴⁶² to extend the grounds of unworthiness to include persons who forge a will. McCall J explains the analogy as follow:

“In my view, by analogy with the case of a legatee hiding a will in order to deprive the heir of his inheritance, the first defendant in this case ought to be considered unworthy of inheriting from the intestate estate of the testator and his share on intestacy to accrue to his brothers and sisters.”

⁴⁵⁶ See also *Bank of Lisbon and South Africa v De Ornelas* 1988 (3) SA 580 (A) 610; *Government (Minister of Land) Respondent* 1917 AD 262 269.

⁴⁵⁷ “Reconsidering the indignus principle in the South African law of succession” in De Waal and Paleker *South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 128.

⁴⁵⁸ *Taylor v Pim* (1903) 24 NLR 484. De Waal and Zimmermann mention examples of grounds which became obsolete, such as a mother who does not seek a guardian for her minor child who is still below puberty and who doesn't have a guardian; a widow who marries another man within a year after her husband dies (see Voet 34 9 2); a person who has not avenged the deceased's death; an adulterous to whom something has been left by the adulterer (see Voet 34 9 3) and a person who does not honour the legacy of the deceased (see De Groot 2 24 24).

⁴⁵⁹ 1952 (1) SA 744 (T).

⁴⁶⁰ 751H.

⁴⁶¹ 2001 (1) SA 410 (D).

⁴⁶² Voet 34 9 2. This ground of unworthiness was recognised in South African law in *Yassen v Yassen* 1965 (1) SA 438 (N). See ch 3 above.

McCall J held that the first defendant is unworthy to inherit or receive any other benefit from the deceased estate. His justifies this conclusion on the basis of a general underlying principle of unworthiness:⁴⁶³

“In my judgment public policy requires that someone who has sought, to defraud persons of their rightful inheritance by forging a will should be regarded as being unworthy of succeeding to the estate of the person whose heirs he attempted to defraud”.

Although *obiter*, the court in the *Taylor*-case refers with approval to the statement of Domat which clearly implies that it is ineffective to remain in the straitjacket of a specific and closed list of grounds of unworthiness to inherit.⁴⁶⁴ This approach receives further support in the case of *Danielz NO v De Wet*⁴⁶⁵ when dealing with the question of whether the respondent can inherit under her husband’s will. Traverso AJP held that the beneficiary is unworthy to inherit any benefit under the will for the same reasons than being unworthy to take any benefits in terms of the insurance policy.⁴⁶⁶ She also refers to the *bloedige hand* maxim and points out that the rule “has been part of our common law since Roman times.”⁴⁶⁷ Traverso AJP emphasises that murder is only one of numerous listed grounds of unworthiness mentioned by the Roman-Dutch authors. She goes on to say that it will be “inappropriate to list specific grounds upon which a person was to be considered unworthy to inherit.”⁴⁶⁸ Traverso AJP further states that it can be accepted that these listed grounds cannot be seen as static and that “the common law should be developed to include those grounds that presently offend the *boni mores* of society.”⁴⁶⁹ She concludes that there is not any doubt that the respondent is unworthy to receive any benefit under her husband’s will, whether it is because of their marriage in community of property, in terms of the insurance policy or as heir in terms of the will.⁴⁷⁰ De Waal and Zimmermann⁴⁷¹ point out that the *Danielz*-case also provides authority for the extension of the grounds of unworthiness to fields *outside*

⁴⁶³ *Pillay v Nagan* 425A.

⁴⁶⁴ *Taylor v Pim* (1903) 24 NLR 484 493.

⁴⁶⁵ *Taylor v Pim* (1903) 24 NLR 484.

⁴⁶⁶ *Danielz NO v De Wet* par [36].

⁴⁶⁷ *Danielz NO v De Wet* par [37].

⁴⁶⁸ *Danielz NO v De Wet* par [38].

⁴⁶⁹ *Danielz NO v De Wet* par [38].

⁴⁷⁰ *Danielz NO v De Wet* par [38]. De Waal and Zimmermann pointed out that strictly speaking, it was unnecessary for Traverso AJP to consider this issue at all because the respondent had in any event repudiated her and her husband’s joint will after his death (see par [6] and [39]).

⁴⁷¹ Mostert *et al* (eds) *Essays in Honour of CG Van der Merwe* (2011)169 190.

the law of succession, for example matrimonial property benefits, pension benefits and insurance benefits. Hahlo points out that courts will have the discretion to develop the application of the general rule of unworthiness to fields both within and outside the law of succession, because “times change and conceptions of public policy change with them”.⁴⁷²

It is said that public policy, which is the representation of the legal convictions of the community, is rooted in the Constitution and the fundamental values it promotes.⁴⁷³ Public policy enforces the ideas of fairness, justice and reasonableness. Public policy represents the general sense of justice of the community, the *boni mores*, manifested in public opinion.⁴⁷⁴ Another applicable common law principle is the requirement of good faith.⁴⁷⁵ The court in *Barkhuizen v Barkhuizen*⁴⁷⁶ puts it into perspective by saying that the way our law currently stands; good faith is an underlying value that is given expression through existing rules of law, but not a self-standing rule.⁴⁷⁷ This view is also confirmed in *Potgieter v Potgieter NO*.⁴⁷⁸ It is submitted that the courts should not be given unlimited discretion to extend the grounds of unworthiness based on public policy. The opinion of what counts as unworthy behaviour which is against public policy is very subjective and will differ from court to court. To allow courts a broad discretion in this regard will lead to wide spread judicial precedents and consequently legal uncertainty.

In conclusion, the purpose of this chapter is to reiterate the argument that the problem does not lie with the decisions of the court, but rather with the reasoning of the judicial officers about why a person is unworthy to inherit. Barns and Thompson⁴⁷⁹ emphasises that the outcome of the cases will not necessarily be different, but the principles of precedent will be better served if the decisions of courts are based on the general common law principle of unworthiness or one of the other recognised common law grounds of unworthiness. They warn that the test

⁴⁷² 1950 SALJ 231 240.

⁴⁷³ *Minister of Education v Syfrets* NO 2006 4 SA 205 (C) par [24]; *Barkhuizen v Napier* 2007 5 SA 323 (CC).

⁴⁷⁴ *Barkhuizen v Napier* par [73].

⁴⁷⁵ *Barkhuizen v Napier* par [79-80] referring to *Tuckers Land and Development Corporation v Hovis* 1980 (1) SA 654 (A) 651 (C).

⁴⁷⁶ 2007 5 SA 323 (CC).

⁴⁷⁷ *Barkhuizen v Napier* par [82].

⁴⁷⁸ (2011) ZASCA 181 629/2010 30/09/2011.

⁴⁷⁹ De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 130 135.

suggested by Domat is too vague. Applying this test might possibly lead to unjust results. Although the test does provide the benefit of flexibility within the law, an argument in favour of its application will have to be well-reasoned to outweigh all the possible risks and also the rules of precedent.⁴⁸⁰ Cases subsequent to *Taylor v Pim*⁴⁸¹ that rely on Domat fail to provide a logical and well-reasoned argument.⁴⁸² Domat's Gloss raises tension between the view of broader society of what equity and good manners require on the one hand, and on the other hand, the testator's true intention and freedom of testation to leave his estate to whomever he deems fit, regardless of the beneficiaries' unworthiness in the eyes of the wider public.⁴⁸³

⁴⁸⁰ Barns and Thompson in De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 130 135.

⁴⁸¹ (1903) 24 NLR 484.

⁴⁸² Barns and Thompson in De Waal *et al South African Law of Succession and Trusts: The past meeting the present and thoughts for the future* (2014) 130 131.

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